

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6075

**United States Court of Appeals
For the Second Circuit**

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS,

and

NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE
COMMITTEE OF INTERNS AND RESIDENTS**

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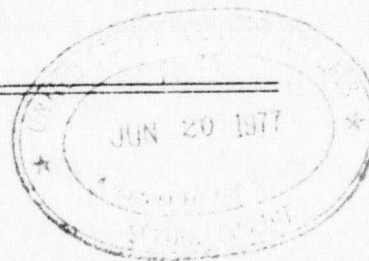


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NATIONAL LABOR RELATIONS BOARD
Plaintiff-Appellant,

v.

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NEW YORK STATE LABOR RELATIONS BOARD
Defendants-Appellees.

On Appeal from a Decision of
The United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE
COMMITTEE OF INTERNS AND RESIDENTS

Statement of the
issue presented.

Whether the State of New York is preempted and ousted from its police power to regulate and control labor relations and disputes between non-profit private hospitals in that State and their house staff officers by reason of the National Labor Relations Act which has been determined by the National Labor Relations Board to exclude such house staff officers from the coverage of that Act.

Statement of the case.

1. Preliminary statement.

This is an appeal from an order of District Judge Charles E. Stewart of the Southern District of New York dismissing the action by the plaintiff-appellant, National Labor Relations Board ("NLRB"), for injunctive and declaratory relief against the defendants-appellees New York State Labor Relations Board ("SLRB") and Committee of Interns and Residents ("CIR"), an organization comprised of and representing interns, residents and clinical fellows (collectively known as "house staff officers").

At the time of the institution of this action the SLRB was under the order of the New York State Supreme Court, New York County, in a proceeding brought by the CIR, to assume and assert jurisdiction over unfair labor practice charges and certification proceedings initiated before the SLRB by the CIR pursuant to the State Labor Relations Act ("SLRA"). The complaint alleges (A 3-10)^{1/} that the National Labor Relations Act ("NLRA") has preempted the area of labor relations of voluntary hospitals, including their house staff officers, and the exclusion of house staff officers by the NLRB from the NLRA ousts the SLRB from exercising any jurisdiction over such house staff. Jurisdiction for injunctive relief was based by the NLRB upon the NLRB v. Nash-Finch Co., 404 U.S.138 (1971), exception to the 28 U.S.C.2283 prescription against federal injunctions of state court proceedings.

2.

^{1/}The Appendix is referred to as "A", followed by the pages referenced.

The answer denies that the NLRB is lawfully authorized or was intended by the NLRA to preempt all state and local coverage of house staff labor matters by reason of the exclusion of house staff from NLRA coverage by the NLRB. A 19-38. As a first defense, the answer asserts that injunctive relief is barred by 28 U.S.C.2283, considerations of comity, and the absence of any showing of injury or damage. As a second defense, the answer sets out that the preemption and ouster of state jurisdiction over house staff proposed by the NLRB is not authorized by the NLRA and contrary to the purpose, intent, and legislative history of the NLRA. And as a third defense, the answer asserts that if, as the NLRB contends, the NLRA effects or authorizes the exclusion of house staff officers from state and local as well as federal labor relations law coverage, the NLRA is so arbitrary, unreasonable, and without cause or justification as to violate the Due Process Clause of the 5th Amendment and the reserved powers of the 10th Amendment to the United States Constitution.

The SLRB submitted an answer which, in effect, submits to the jurisdiction of the court and such judgment as the court may issue. A 160.

Prior to the joinder of issue, the NLRB moved for a preliminary injunction prohibiting the SLRB from proceeding to process the matters remanded to the SLRB by the state Supreme Court. A 13-16. Simultaneously with the service of its answer, the CIR cross-moved for summary judgment (A 17-18) with supporting affidavits (A 150-59). The NLRB submitted no response to the affidavits proffered by the CIR on the summary judgment cross-motion. The record consists of the described pleadings.

After oral argument (A 73-149), District Judge Stewart, in an opinion dated January 31, 1977 (A 39-71) (reported at 426 F. Supp. 438), sustained the NLRB contention that the District Court had jurisdiction over the subject-matter of this litigation, pursuant to Nash-Finch,^{2/} and in the exercise of that jurisdiction the District Court denied the NLRB motion for a preliminary injunction and granted the CIR cross-motion for summary judgment by order dated March 7, 1977. A 72. The NLRB appealed from the order on May 3, 1977. A 162.^{3/}

2. The facts.^{4/}

The CIR is an organization representing approximately 6,000 house staff officers in the New York City metropolitan area working as physicians in training programs at municipal and voluntary non-profit hospitals. A 20.^{5/} The organization has been

4.

^{2/} No appeal has been taken from this aspect of the determination below.

^{3/} The SLRB brief here continues to maintain the position taken in the SLRB answer. This Court has authorized amici briefs by (i) the Association of American Medical Colleges ("AAMC") and American Hospital Association ("AHA"), (ii) four New York voluntary hospitals and two New York hospital associations ("the New York hospitals amici"), and (iii) the Albert Einstein College of Medicine ("AECOM").

^{4/} In view of the described state of the record, there is no issue of fact presented.

^{5/} House staff officers are college and medical school graduates, licensed physicians or otherwise legally authorized to provide medical care at hospitals, who provide such care to hospital patients as part of an American Medical Association ("AMA") accredited hospital-based training program in a medical specialty or sub-specialty. See AMA Liaison Committee on Graduate Medical Education, Directory of Accredited Residencies 1975-76 (1976) (continued)

functioning in the foregoing capacity since 1957. Ibid. Prior to October 1, 1976, the CIR had collective bargaining contracts covering approximately 4,000 house staff officers at twelve voluntary non-profit hospitals under the aegis of the League of Voluntary Hospitals and Homes of New York ("the League"), seven independent non-profit voluntary institutions, and nine municipal hospitals on the New York City Health and Hospitals Corporation ("the HHC") payroll. Ibid. In each hospital covered by an agreement with the CIR, the organization was recognized by the agreement and/or certified by the SLRB or NLRB as the exclusive collective bargaining representative of the house staff. A 21-22. The described collective bargaining agreements covered matters such as wages, vacations, insurance, uniforms, laundry, meals, housing, on-call rooms, work schedules, tenure, grievance procedures, etc. See CIR answer, Exh. 1 and 2.

5.

5/ continued.

("Residency Directory") at 333. The satisfactory completion of such a training program qualifies a house staff officer to take an AMA specialty board examination which, if passed, results in certification in the specialty by that board. Id. at 367. Certification is not a legal prerequisite to the practice of a specialty. The described training program consists of patient care as well as academic activities. Id. at 333-38. A study by the Institute of Medicine, sponsored by HEW pursuant to law, found that 84% of the time of a house staff officer is devoted to patient care; 10% to "learning"; 3% to "research"; and approximately 60% in patient care and teaching without direct supervision. Institute of Medicine, Medicare-Medicaid Reimbursement Policies, Final Report, ch. 4 ("Graduate Medical Education") (March 1976) at 12, Table 6.

The SLRB is the state agency with jurisdiction, pursuant to the SLRA (Labor Law, Article 20), to implement and enforce the lawful rights of employees to bargain collectively through labor organizations of their own choosing. SLRA §1(12) [Labor Law §701(12)] extends coverage of the SLRA to persons working or employed at non-profit voluntary health institutions. SLRA §13 [Labor Law §713] prohibits lockouts and strikes in such facilities and SLRA §16 [Labor Law §716] provides for grievance and bargaining impasse mechanisms, including arbitration, to deal with hospital labor disputes. Prior to 1974 the SLRB held that house staff officers at voluntary hospitals are covered by the SLRA. Brooklyn Eye and Ear Hospital, 32 SLRB No. 21 (1966); Long Island College Hospital, 33 SLRB No. 32 (1967).

In that same period prior to 1974, the NLRA excluded from its coverage employees of charitable, non-profit institutions. Effective August 25, 1974, that exclusion was dropped upon the enactment of Public Law 93-360, 93rd Cong., 2d Sess., 88 Stat. 395 ("PL 93-360").^{6/} In the first NLRB case involving house staff, however, it was held that house staff are "primarily students," not employees covered by the NLRA, and that their house staff organizations are not labor organizations within the NLRA. Cedars-Sinai Medical Center, 223 NLRB No. 57 (1976), re-
consid. den. 224 NLRB No. 90 (1976) ("Cedars-Sinai").^{7/} The same

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^{6/} PL 93-360 also added certain notice, mediation, and fact finding procedures in connection with disputes and strikes in non-profit health care institutions. NLRA §§ 8(d), 8(g), 213 [29 U.S.C. 158(d), 158(g), 183].

^{7/} A fuller description of the relevant aspects of Cedars-Sinai and of the various subsequent NLRB and court decisions cited under this heading will be found at pp. 12-31, infra.

conclusion was reached by the NLRB in every subsequent house staff case. St. Christopher's Hospital, 223 NLRB No. 58 (1976); University of Chicago, 223 NLRB No. 154 (1976); St. Clare's Hospital, 223 NLRB No. 163 (1976) (CIR was the petitioner in this case); Buffalo General Hospital, 224 NLRB No. 17 (1976); Kansas City General Hospital, 225 NLRB No. 14 (1976) ("Kansas City I"); Wayne State University, 226 NLRB No. 168 (1976); see also Clark County Mental Health Center, 225 NLRB No. 105 (1976). Each case after Cedars-Sinai was decided by the NLRB without review or discussion of the house staff involved, but with the conclusory finding only that the house staff "are not unlike those" in Cedars-Sinai.

After the NLRB decision in Cedars-Sinai, the CIR instituted the following proceedings before the SLRB involving voluntary health care institutions in New York: (1) a certification proceeding where the CIR represents a majority of the house staff at a hospital, Misericordia, but there was no previous certification or contract and Misericordia refused to bargain with the CIR; (2) an unfair labor practice charge where the CIR was newly certified by the New York Regional Director of the NLRB after an election as the collective bargaining representative of the house staff at a hospital, Beth Israel, but Beth Israel refused to bargain with the CIR; (3) an unfair labor practice charge where the CIR was recognized by an expired contract as the representative of clinical fellows at a hospital, AECOM, but AECOM refused to bargain with the CIR upon the termination of the contract and proceeded unilaterally to make salary and other changes affecting clinical fellows; and (4) unfair labor practice charges

where the CIR was certified and recognized by the existing League contract with the CIR as the house staff representative at Brookdale, Catholic Medical, Joint Disease, and Jewish-Hillside hospitals, but those hospitals refused to negotiate new contracts with the CIR and made unilateral changes affecting house staff hours, wages, or terms of employment. A 5-8, 24-25; see also CIR answer Exh. 11-14. All of the hospitals predicated their refusal to bargain with the CIR upon the NLRB ruling in Cedars-Sinai and objected to any intervention by the SLRB, claiming that the SLRB is without jurisdiction by reason of the NLRA coverage of non-profit hospitals pursuant to PL 93-360. A 151-52. According to the hospitals, the NLRB denial of NLRA coverage to house staff also ousted the SLRB of jurisdiction over house staff. A 152. The cumulative effect of such denial and ouster of jurisdiction was alleged by the CIR, without contradiction, to be totally destructive of long-established CIR collective bargaining rights, except insofar as such rights could be extracted from the hospitals by the CIR by self-help. A 153.

On July 14, 1976, the SLRB in Misericordia Hospital Medical Center, 39 SLRB No. 32, briefly recited the background giving rise to the issue of preemption, and then concluded:

"The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of this issue. On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Accordingly, we shall dismiss the petition." (Id. at 2).

The same ruling was rendered in each of the other CIR proceedings before the SLRB. A 26-27.

Four proceedings were instituted against the SLRB in the New York Supreme Court, New York County, each one covering one of the four different fact situations described at pp. 7 - 8, supra, and all seeking to reverse the SLRB determinations and to compel the SLRB to assume and exercise jurisdiction. Originally returnable at Special Term, Part I, of the aforesaid state court on September 3, 1976, several of the voluntary hospitals involved, whose intervention was consented to by the CIR as early as September 3, obtained adjournments to September 16, 1976. A152-53. On September 15 and September 16, 1976, those hospitals removed the state court proceedings to this Court upon ex parte petitions to U.S.D.C. Judge Brieant. A 9, 28. Further delays were obtained by those hospitals with respect to the CIR motion for remand, which motion was ultimately granted by Judge Brieant in a memorandum and order of September 28, 1976. CIR v. SLRB, 420 F.Supp. 826 (S.D.N.Y. 1976). On the remand, the hospitals requested and were granted still a further delay in the state court proceedings. A 153. By decision dated October 14, 1976, Mr. Justice Gellinoff of the New York Supreme Court granted the CIR petitions and held that the SLRB was not preempted by the NLRA from exercising jurisdiction over house staff represented by the CIR at the voluntary hospitals involved. CIR v. SLRB, 388 N.Y.S.2d 509.

As appears from the affidavit of Edward T. Gluckmann, Executive Director of the CIR, submitted below in support of the CIR summary judgment cross-motion ("Gluckmann affidavit"), the consequence of the described events was a series of recognition-al strikes by the CIR at twelve hospitals during the period from

October 5, 1976 to October 15, 1976. A 151-56. With few exceptions, CIR contracts with voluntary hospitals in New York City had October 1 as their anniversary dates and October 1, 1976, as their termination dates. A 152. By October 1, 1976, the CIR was confronted with the circumstance that almost all voluntary hospitals which had previously recognized and bargained collectively with the CIR, including hospitals involved in the pending state court proceedings, were now refusing to recognize or bargain with the CIR and were proceeding to fix the hours, wages and terms and conditions of employment of their house staff officers unilaterally and, in some cases, in violation of pre-existing and terminated agreements. A 152-53. The CIR had no recourse to the NLRB because of Cedars-Sinai, was denied protection under the SLRA by the SLRB, was unable to obtain a prompt adjudication in the state courts by reason of delays obtained by the hospitals, and was further confronted with the prospect of administrative proceedings before the SLRB on the kind of issues which had been presented to the NLRB in the various house staff cases. The described strikes ensued and were concluded by settlements and recognition at various voluntary hospitals. A 154-55. According to the Gluckmann affidavit, no such strikes would have been necessary or would have taken place if the CIR had had access to the NLRB or to the SLRB. A 155-56.

On September 3, 1976, during the pendency of the proceedings in the state court, the CIR invited the NLRB in writing to participate in those proceedings. A 30-31. The NLRB declined that opportunity on September 8, 1976. A 31. Instead, shortly

after the state court determination that the SLRB was not preempted, the NLRB on November 9, 1976, sua sponte, "revised" its decision in Kansas City I in the form of Kansas City General Hospital, 225 NLRB No. 14A ("Kansas City II"), expressly directed at the state court decision and declaring that Cedars-Sinai and the other NLRB house staff decisions were intended to preempt and oust state and local governments from jurisdiction over voluntary hospital house staff labor matters. Kansas City II involved none of the parties here concerned and the issue of preemption had not been raised or argued in that case. A 32; see also Kansas City II at 4 n. 6. The instant action was commenced by the NLRB approximately one week after Kansas City II. On December 17, 1976, the NLRB motion and the CIR cross-motion were argued before Judge Stewart. A 73.

Promptly after Kansas City II, the hospitals moved in the state court for reargument. On January 6, 1977 that motion was granted as the state court deemed itself bound by Kansas City II, indicating that the CIR's "remedy lies with the Federal Courts, or with Congress...." CIR v. SLRB, 391 N.Y.S.2d 503, 505. Thereupon the NLRB sought to withdraw the matter pending before the District Court, but that application was denied by Judge Stewart.

On May 27, 1977, following the decision of the District Court and the filing of the NLRB appeal to this Court, the NLRB rendered its decision in St. Clare's Hospital, 229 NLRB No. 158 ("St. Clare's"), denying a motion for reconsideration pending since April 27, 1976. St. Clare's at 1. Although that motion contained only "an allusion to the possible preemptive effect of Cedars-

Sinai" (id. at 31), and the issue of preemption was not there further raised or argued, the NLRB reviewed the state and federal litigation leading to the appeal to this Court (id. at 2-3), and proceeded to "clarify" and amplify its views on proscription, by means of preemption, of house staff collective bargaining. In dissent, Chairman Fanning repeatedly pointed out that St. Clare's, as Kansas City II, was more oriented to litigation constraints of the NLRB than to the statutory adjudicatory functions of the NLRB. Id. at 18 n. 33, 34; 19; 23; 25 n. 48; 30.

3. The decision below and other related court and NLRB decisions.

(a) Cedars-Sinai

Cedars Sinai was decided 4 - 1, then Member and now Chairman Fanning dissenting.^{8/} The majority there analyzed various aspects of the experience of house staff at the institutions at which they train and serve, and concluded house staff officers were engaged in graduate education and are not employees within the meaning of the NLRA. Cedars-Sinai at 1-10. The dissent of Member Fanning came to a different conclusion. He read the term "employee" in the NLRA not to exclude those employees who may also be students, basing that conclusion upon NLRB precedents, other administrative and judicial rulings, patient care services provided by house staff, the relationship between house staff and institution, NLRA language, and the legislative history and purpose of PL 93-360. Id. at 11-25. Notwithstanding the unusually comprehensive, detailed, and critical dissent, the majority opinion in Cedars-

^{8/} There is presently pending in the District of Columbia District Court (Physicians National House Staff Association v. Murphy, (continued)

Sinai did not cite a single NLRB or court precedent, or any legislative history, or any other authority of any kind. Nor does the Cedars-Sinai majority mention a national labor policy or any policy implicated by its decision, in response to the acerbic criticism by the dissent of the absence of any labor policy to justify the decision. Three members of the Cedars-Sinai majority later acknowledged that "Much of the blame for this misunderstanding [of the policy considerations underlying Cedars-Sinai] can perhaps justifiably be laid at our feet for we may not have been as precise as we might have been in articulating our views." St. Clare's at 3.

(b) CIR v. SLRB

Preemption is nowhere mentioned in Cedars-Sinai or any of the first series of NLRB house staff cases. That issue was first addressed in the house staff context by Mr. Justice Gellinoff in the state court proceedings. CIR v. SLRB, 388 N.Y.S.2d 509. He considered that the doctrine of preemption could be summarized as follows:

"...State jurisdiction is defeated when the federal statute, as authoritatively interpreted, either specifically governs the issue in question, or specifically intends to relegate it to a 'no man's land', where no regulation is to be permitted...."
(Id. at 512).

13.

8/ continued

Civ. 77-0358) a challenge to the participation of Member Walther in Cedars-Sinai on the grounds that when it was argued before the NLRB he was a member of a law firm representing St. Christopher's Hospital, one of the hospitals in the series of house staff cases argued and considered jointly with Cedars-Sinai.

The state Supreme Court then concluded:

"Here, although the National Board has taken jurisdiction generally over the non-profit hospitals, it has concluded that the Act does not provide it with jurisdiction over interns, residents and clinical fellows. The National Board did not hold in Cedars-Sinai, as it, and the Supreme Court, did in Bethlehem Steel, supra, that, for reasons of national labor policy, interns, residents and clinical fellows ought not be deemed an appropriate separate bargaining group. Rather, it has simply held that they do not come within the statutory definition of 'employee' under the National Labor Relations Act. Furthermore, neither in the language of the National Labor Relations Act, nor in the National Board's ruling in Cedars-Sinai, is there any indication of an intention that these vital members of a hospital's working staff should be bereft of any labor regulation at all." (Ibid.)

Judge Gellinoff also made the point that in Kansas City I:

"...the National Board expanded its ruling, and held that the not-for-profit hospital there involved 'is not an "employer" within the meaning of Section 2(2) of the Act (29 U.S.C. §152(2)) for the purpose of any disputes relating to such personnel' [citing Kansas City I].

Since then, as the National Board has now ruled, the intervening hospitals are not 'employers' as defined by the National Labor Relations Act with respect to disputes relating to interns, residents and clinical fellows, it follows that the jurisdiction of respondent State Board over disputes between petitioner and the intervening hospitals is unaffected by the 1974 amendments to the National Labor Relations Act, and therefore the Board retains the same jurisdiction it previously possessed." (Ibid.)

(c) Kansas City II

Six months after Kansas City I, but less than three weeks after Judge Gellinoff's decision, the NLRB, in a "somewhat precipitate" fashion according to the court below (426 F.Supp. at 45),

sua sponte issued Kansas City II. The explicit purpose of Kansas City II was to "disavow" the Kansas City I language, relied upon by the state court, that the hospital was not an employer within the NLRA,^{9/} and "...to eliminate any doubt that it was the intention of a majority of the Board, in Cedars-Sinai, to find state jurisdiction over residents, interns, and fellows to have been preempted by the Federal statute...."^{10/} Kansas City II at 2, 4. (It will be recalled that not until Kansas City II did the NLRB once refer to a national labor policy or the matter of preemption pertaining to house staff officers.) According to the NLRB, in passing PL 93-360 the Congress left to the NLRB the discretion to determine whether house staff officers were employees and when the NLRB found them to be primarily students and not employees within the NLRA, the NLRB thereby "held that to extend them collective-

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^{9/} In the course of the described "disavowal," the majority of the panel which decided Kansas City I nevertheless acknowledged "...we believed it logically follows that the Employer, Hospital Hill, could not be an employer of nonemployees; in our view, interns, residents, and fellows...." Kansas City II at 4 n. 6. Chairman Fanning made the same point in Kansas City II (at 6) and later in St. Clare's Hospital (at 18 n. 33), as did the court below here (426 F.Supp. at 450 n. 8).

^{10/} Chairman Murphy noted, however, that it was not her intent at the time of the decision of Cedars-Sinai and/or Kansas City I "that the Board was preempting the field...., but she has now been persuaded that this was the effect of the 4 to 1 majority holding therein." Kansas City II at 4 n. 6.

bargaining rights would be contrary to that very [national labor] policy." Id. at 4-5. No further elaboration of the national labor policy said to be implicated is provided.

Member Fanning dissented. He dealt pointedly with the effect of a national labor policy proscribing any regulation of house staff labor relations and labor disputes, as follows:

"But observe, the effect of my colleagues' decision is that housestaff, though not protected in their right to organize and bargain collectively, are not prohibited from doing so, and their organizational, recognition, and bargaining strikes are no longer subject to the restraints on such activities that Congress enacted specifically to regulate such activities in the health care industry. For, if housestaff are not employees, if their associations are not labor organizations, none of the provisions of Section 8(b), 8(d), and 8(g) apply to such activities. Of course, it is true also that the restraints of Section 8(a) do not apply to those hospitals wishing to combat housestaff attempts to organize and bargain collectively. My colleagues have, thus, assertedly as an exercise of discretion, decided that it will effectuate the policies of the Act not only to apply provisions of the Act enacted specifically to bring about the peaceful settlement of labor disputes in this industry to the end that patient care will not be disrupted. They now compound the problem by seeking to preclude intervention by any state court or board, whether by making available procedures for the peaceful settlement of such disputes, or by injunction. Such disputes will be resolved solely in accordance with the militancy and economic resources of the contending parties, free of any restraining or mediatory influences of Federal or state law. If this be preemption, it is preemption solely for its own sake. It is not preemption designed to carry forward any policy established by Congress:

'The Committee was also impressed with the fact, emphasized by many witnesses, that the exemption of nonprofit hospitals

from the Act has resulted in numerous instances of recognition strikes and picketing. Coverage under the Act should completely eliminate the need for such activity, since the procedures of the Act will be available to resolve organizational and recognition disputes.'

Those procedures and those designed 'to insure the continuity of health care to the community and the care and well being of patients by providing for a statutory notice of any anticipated strike or picketing' and 'for mandatory mediation by the parties with the FMCS in the case of collective bargaining [disputes]' are, by my colleagues' act of 'discretion,' no longer applicable to disputes involving house-staff. Yet they wish also to preclude the States from intervening in order to effectuate peaceful resolution of such disputes. I must, and do, dissent." (Id. at 7-8) (footnotes omitted).

The Kansas City II majority did not deny or discuss Member Fanning's description of the "no-man's land" effect of Kansas City II, nor did the majority otherwise deal with Member Fanning's claimed incompatibility between the purposes of PL 93-360 and Kansas City II.

(d) The decision below,
NLRB v. CIR

The court below did not consider that Kansas City II sufficiently amplified the national labor policy purportedly served by Cedars-Sinai. 426 F.Supp. at 452. At oral argument NLRB and amicus counsel were frequently requested to provide such amplification, but neither was able to do so. A 90-91, 139-41, 142-44. NLRB counsel ended discussion of the matter as follows:

"THE COURT:...Now, here if the impact is purely local, what difference does it make from the standpoint of national policy whether, since the board has decided that it isn't going to regulate and, as you put it, has decided that these people shouldn't

have collective bargaining rights, is there an impact that is more than local if in New York State the residents, interns are permitted to participate in collective bargaining and in New Jersey they aren't?

MR. TAYLOR:...Now, the question in the area of labor relations is whether Congress has totally pre-empted the field so that there is no role left for the states to play. If that is the case, then --

THE COURT:...Let's assume that is so, I still don't understand why the board feels that it is a good thing from the standpoint of national policy to exclude the people we are talking about.

MR. TAYLOR:...For that I respectfully refer the Court to the board's decisions. I am afraid that is as much help as I can be to the Court on that question." (A 143-44).

Not surprisingly, the court below was obliged to remark:

"We also have not been directed to, nor have we found, any expression of a national labor policy that students be wholly unregulated in either the Act itself or its legislative history. Nor have plaintiff or amici been able to articulate the rationale which would support such a national policy vis-a-vis students." (426 F.Supp. at 452).

In his opinion, District Judge Stewart fully set out the history of this litigation, including the relevant state court and NLRB decisions through Kansas City II. 426 F.Supp. at 440-43. He then sustained the NLRB in its contention that the District Court had jurisdiction pursuant to Nash-Finch (id. at 443-47), an issue not presented on this appeal.

His preemption analysis starts with identification of the three categories of NLRA-preemption cases: (i) where activity is arguably permitted or prohibited by the NLRA (the "Garmon doctrine")^{11/}; (ii) where jurisdiction is declined on the ground

^{11/} Citing San Diego Building Trades Council v. Garmon, continued.

that it would not effectuate the policy of the NLRA to exercise jurisdiction^{12/}; and (iii) where the Garmon doctrine does not apply, but it is national labor policy that the activity involved be wholly unregulated and left to the free play of economic forces.^{13/} 426 F.Supp. at 447-48.

Judge Stewart turned first to the applicability of the Garmon doctrine here. He reviewed the PL 93-360 history and found that its intent was to preempt the field of labor relations of voluntary health care facilities employers and employees. Id. at 448. But in Cedars-Sinai the NLRB determined as an initial, threshold jurisdictional question that house staff officers are not employees within the NLRA, and accordingly dismissed the Cedars-Sinai house staff union representation petition for lack of a "question affecting commerce...concerning the representation of employees of the Employer within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act." Id. at 449, quoting Cedars-Sinai at 3, 8. Judge Stewart pointed out that each of the operative aspects of the NLRA involves employees and employee labor

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^{11/} continued
359 U.S.236, 244-45 (1959); Amalgamated Association, etc. v. Lockridge, 403 U.S.274 (1971); Garner v. Teamsters, etc., 346 U.S.485 (1953); LaCrosse Telephone Corp. v. WERB, 336 U.S.18 (1949).

^{12/} Citing Bethlehem Steel Co. v. SLRB, 330 U.S.767 (1947) ("Bethlehem Steel").

^{13/} Citing Local 20, Teamsters, etc. v. Morton, 377 U.S.252 (1964); IAM & AW Lodge 76, etc. v. WERC, 427 U.S.132 (1976).

organizations within the NLRA. Id. at 449. Moreover, "the language of the NLRA...nowhere applies to the labor relations of non-employees, whether or not they happen to provide their services for entities that are 'employers' under the Act." Id. at 450 (emphasis in original). Judge Stewart concluded that the NLRA by its terms, as construed by the NLRB in Cedars-Sinai,^{14/} is not applicable to house staff, and since the NLRA therefore "cannot apply to protect or prohibit" house staff activity, the Garmon doctrine "...cannot encompass the labor relations of house staff...." Ibid.

For similar reasons, Judge Stewart found the Bethlehem Steel preemption variation inapplicable. He noted that the NLRB declination of NLRB jurisdiction over foremen as supervisors in Bethlehem Steel, so as to preclude state jurisdiction over those same foremen, was explicitly premised by the United States Supreme Court "on the fact that the Board had jurisdiction over the foremen's petition." Id. at 449-50, quoting Bethlehem Steel at 776. Here, then unlike Bethlehem Steel, the NLRB had no jurisdiction over house staff officers once the NLRB found them not to be employees, and therefore "had no jurisdiction...it could decline to assert" as it did in Bethlehem Steel. Id. at 450. The District Court also pointed out that the substantive policy considerations underlying the Bethlehem Steel proscription of collective bargaining for supervisors under state, local or national law, do not obtain here:

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^{14/} The court below considered its "role...is not to review this original determination...." (426 F.Supp. at 449), and neither appellant nor any amicus challenges this proposition before this Court.

"Further, the student-teacher relationship is not analogous to the supervisor-employer relationship, and thus we do not find the policies which led to the statutory exclusion of 'supervisors' from the Act--that their inclusion would improperly taint the collective bargaining process both for other employees and the employer, and would upset the balance of power--applicable here." 15/ (Id. at 453).

The third test of preemption, i.e., whether it was legislatively intended to leave house staff labor relations and disputes free from all regulation, and "left to the unrestrained interplay of economic forces in the marketplace" (id. at 450), is found by Judge Stewart not to be met here (id. at 450-51).

"The general purpose behind the enactment of the health care amendments to the NLRA was to 'insure the continuity of health care to the community and the care and well being of patients' (Senate Report No. 93-766 at 4, 93d Cong. 2d Sess. (1974), U.S. Code Cong. & Admin. News, 1974, pp. 3346, 3949. To this end, the previous exemption of non-profit health care institutions was deleted from §2(2), on the grounds that 'the exemption of non-profit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing' (Id. at 3, U.S. Code Cong. & Admin. News 1974, p. 3948). It was felt that '[c]overage under the Act should completely eliminate the need for any such activity, since the procedures of the Act will be available to resolve organizational and recognition disputes' (Id.)." (426 F.Supp. at 450).

More specifically, the legislative history confirmed no purpose to leave house staff labor matters unregulated:

"The only specific position which Congress took on the question of whether or not housestaff would be included in this plan of national labor regulation,

15/ Citing Beasley v. Food Fair of North Carolina, 416 U.S. 653, 659-62 (1974); NLRB v. Bell Aerospace Co., 416 U.S. 267; Packard Motor Co. v. NLRB, 330 U.S. 485, 496-500 (1947) (Douglas, J., dissenting).

was in response to the suggestion that they might be considered 'supervisors,' and thus be excluded from the Act. On this issue, Congress indicated that housestaff would not come within the definition of 'supervisor' in §2(11)....

This resolution of the one possible exclusion problem that arose suggests that Congress, at the time it was considering the health care amendments, did not have any policy that housestaff should not be covered by the Act or any other body of labor law." (Id. at 451).

The court below then undertook to examine relevant prior NLRB decisions ^{16/} to see whether they would supply the preemptive "national labor policy" concerning house staff or students not to be found in PL 93-360, and concluded there was no such policy. Id. at 451-52. Judge Stewart analyzed the prior NLRB student/employee cases as follows:

"Thus in the majority of these cases, the Board seems to have acted on the principle that student workers are covered by the Act, and to have simply determined that they should not be part of the particular unit that was petitioned for, and not that they should or could never be part of any collective bargaining unit. Indeed the Board in Cedars-Sinai appeared to have explicitly recognized and accepted this principle, stating:

'[w]e are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students. . . we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act.' 223 NLRB No. 57 at 9.

Accordingly, we do not discern in these cases the expression of a uniform national labor policy that workers who are also students or 'primarily students' should be denied collective bargaining rights." (Id. at 452).

22.

^{16/} Citing Leland Stanford Junior University, 214 NLRB No. 82 (1974); Barnard College, 204 NLRB No. 155 (1973); Cornell University, 202 NLRB No. 41 (1973); Georgetown University, 200 NLRB No. 14 (1972); College of Pharmaceutical Sciences in the City of New York, 197 NLRB No. 142 (1972); Adelphi University 195 NLRB No. 107 (1972).

Judge Stewart also rejected the proposition that the claimed adverse effect of house staff collective bargaining on medical education could serve as the basis of a "national labor policy" (id. at 452-53) (emphasis in original), or that such bargaining would compromise the integrity of other bargaining covered under the NLRA as in the case of supervisor or managerial bargaining (id. at 453).

The decision below concluded with recognition of the differences between the NLRA and SLRA in the latter's prohibition of lockouts and strikes and compulsion of arbitration at voluntary hospitals. Id. at 453. Judge Stewart considered, however, that, notwithstanding those differences, in the absence of NLRA coverage, SLRA coverage rather than exclusion of house staff labor disputes better served the purposes of PL 93-360:

"Congress has expressed particular concern over the disruptive effect on patient care of strikes in health care institutions, and has evidenced a basic intent that the labor relations of these institutions be regulated in order to prevent such disruption. The occurrences, last fall, of recognitional strikes by the CIR in response to the hospitals' refusals to bargain with the CIR because of the Board's ruling in Cedars-Sinai and the hospitals' contention that state regulation had been preempted (Gluckmann Affidavit of November 30, 1970 at 2-6), is exactly the evil sought to be removed by the enactment of the 1974 amendments. Thus we think that allowing the possibility of state regulation of housestaff is more in harmony with, and in furtherance of, the national labor policy and Congressional intent relating to health care institutions, than is foreclosing any state regulation of housestaff labor relations." (Ibid.)

(e) St. Clare's

In direct response to the decision below, and not to issues raised or argued therein, the NLRB wrote its opinion in St. Clare's denying a CIR motion for reconsideration in that case which had been pending for over one year. See pp. 11-12, supra. A national labor policy concerning house staff labor relations, not previously stated by the NLRB or discernible to the court below, was now articulated. St. Clare's at 1-16. Chairman Fanning dissented. Id. at 18-31.

Member Jenkins concurred only in the result, and stated that it was otherwise "necessary that I disassociate myself from the majority view" because he "disagree[d] wholly" with the "seeming willingness [of the majority] to regard any employees who also engage in structured studies as per se being somehow and in some respects disqualified from union representation." Id. at 17.

Former Chairman and now Member Murphy stated that she "is sympathetic to Member Jenkins' concurrence," but, "under the circumstances of this case,"^{17/} she joins the majority herein." Id. at 3 n. 11.

Member Walther on March 31, 1977, approximately two months before St. Clare's, announced his resignation from the NLRB and his imminent return to a law firm which represented St. Christopher's Hospital, one of the hospitals in the initial series of NLRB house staff cases.^{18/}

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^{17/} Nothing further appears in St. Clare's to explain or clarify the "circumstances" thus referred to. The decision does not discuss any facts or "circumstances" relating directly to St. Clare's Hospital.

^{18/} The plaintiffs in Physicians National Housestaff Association v. Murphy, cited at note 8, supra, have moved to supplement their complaint to challenge Member Walther's participation in (continued)

Thus constituted and motivated, the majority in St. Clare's, after acknowledging "uncertainty" and "misunderstanding," --for which the NLRB "can perhaps justifiably" be blamed,-- as to "the precise effect of the 1973 health care amendments on the status of house staff," undertakes "to clarify our view of the relevant legal principles." Id. at 2-3.^{19/}

According to the St. Clare's majority, "Cedars-Sinai is consistent with, and reflective of, longstanding national labor policy as developed and articulated by this Board." Id. at 4. In support of this proposition the majority cites various categories of past NLRB decisions (id. at 4-8), which may most instructively be reviewed along with Chairman Fanning's dissent (id. at 24-29) which he prefaces with the observation that the NLRB "'policy' to which the majority alludes does not, so far as is relevant here, exist. That is to say, there is not, nor has there ever been, any 'longstanding' policy which denies representation rights completely to 'students' who are also 'employees' within the meaning of" the NLRA.^{20/} Id. at 23-24.

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^{18/continued}
St. Clare's at a time when he was scheduled to return to practice with a law firm representing hospitals directly and substantially affected by the decision in St. Clare's.

^{19/} The majority states the occasion for clarification is "questioning [of] the preemptive effect of our decisions in Cedars-Sinai Medical Center and Misericordia Hospital Medical Center, [224 NLRB No. 126 (1976)]" by the CIR motion for reconsideration in St. Clare's. Id. at 2. That motion was served April 27, 1976, almost two months before the NLRB decision in Misericordia Hospital.

^{20/} Chairman Fanning was appointed to the NLRB in 1957 (94 LRRM 321), and has the longest tenure of any member of the NLRB. Member Jenkins is the next senior member. St. Clare's at 26. n.50. Chairman Fanning noted that, with Member Jenkins, he "cannot recall how this particular policy about 'students' came to be." Ibid.

The St. Clare's majority first speaks of cases involving "students employed by a commercial employer in a capacity unrelated to the students' course of study," and cites five ^{21/} such cases where "students are not accorded bargaining rights at all" (id. at 4-5). One of the cases ^{22/} was decided after Cedars-Sinai and need not be discussed further. Chairman Fanning points out that another three of these cases "merely denied, respectively, one temporary employee, several seasonal employees, and one casual employee inclusion in a broader unit with non-student employees.... Clearly, the fact that the excluded individuals were students was essentially irrelevant." Id. at 24. The last case, Saga Food Service of California, Inc., 212 NLRB 786, fn. 9 (1974), ^{23/} is, according to Chairman Fanning, "a case so 'historically' rooted in 'Board policy' that it arose only three years ago and was not followed in a case decided 6 months later, Macke II...." Id. at 24.

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^{21/} The cases are cited in St. Clare's at 5 n. 14.

^{22/} Lake City Home, etc. 229 NLRB No. 5, fn. 1 (1977).

^{23/} The text of the decision in Saga Food is devoted entirely to the propriety of including students in a unit with non-students. Only fn. 9 deals with the denial of all NLRA coverage to such students. Neither Saga Food nor any other NLRB employee/student case before Kansas City II dealt with the issue of preemption.

A second category of cases referenced by the St. Clare's majority are those "in which the students are employed by their own educational institutions in a capacity unrelated to their course of study," where, according to the majority, "the Board has historically...not afforded them [the students] the privileges of being represented," citing San Francisco Art Institute, 226 NLRB No. 204 (1976). Id. at 6. Chairman Fanning reminds us that "San Francisco Art Institute...issued after Cedars-Sinai" (id. at 25), and that that case was decided expressly because the students there involved "are best likened to temporary or casual employees" (id. at 26).

The other category of excluded student/employees cases cited by the St. Clare's majority "is that in which students perform services at their educational institutions which are directly related to their educational program," where "the Board has universally...denied them the right to be represented separately." Id. at 7. The cases cited are Cedars-Sinai; the Leland Stanford Junior University, 214 NLRB 621 (1974); and Adelphi University, 195 NLRB 639 (1972).^{24/} Ibid. Chairman Fanning shows that Adelphi was a unit case which did not hold that the students there were excluded from NLRA coverage (id. at 24, 28), and that Leland Stanford involved non-employees, not students/employees, who performed no work for the benefit of or subject to the control of others for which compensation was received (id. at 27-28).

^{24/} The District Court noted and discussed Leland Stanford and Adelphi in the opinion below. 426 F.Supp. at 452.

We would add that neither Leland Stanford nor any other NLRB decision before Kansas City II deals with or declares the preemptive effect of student exclusion from NLRA coverage. For as Chairman Fanning points out, "...if Leland Stanford is assumed to be proper basis for Cedars itself, then the majority's preemption argument necessarily fails, for the Board, by its own holding has no jurisdiction over the nonemployee housestaff member" (id. at 29); "[i]f the housestaff are simply 'not statutory 'employees,' the Board has no jurisdiction over them. If they are students who also happen to be employees, there is no policy denying them coverage" (id. at 30 n. 58).

The St. Clare's majority adds various policy considerations to those it finds, as indicated, reflected in prior NLRB cases. Id. at 9-12. The mutual interest of the student-teacher relationship in education is said to be so at variance with the conflicting interests in the employer-employee relationship that injecting collective bargaining into the former "would, in our judgment, prove detrimental to both labor and educational policies." Id. at 9. Collective bargaining is considered by the majority to be "the very antithesis of personal individualized education." Ibid. According to the majority opinion, "the student-teacher relationship is an inherently inequalitarian one" with respect to which collective bargaining is "an anathema." Id. at 10. "Academic freedom" as to matters such as curriculum, examinations, and advancement would become "bargainable." Ibid.; see also id. at 11-12. The "long hours" which, the majority acknowledges, house staff officers "work notoriously" pursuant to "educationally sound" reasons,

"could become bargainable." Id. at 11. And subjective assessment of house staff performance, pursuant to which continuation in or dismissal from a training program (and therefore career) is determined, "would be tantamount to discharge and thus a mandatory subject of bargaining," subject ultimately to arbitration which the St. Clare's majority considers an inappropriate modality.^{25/}

Ibid.

All of the foregoing the St. Clare's majority, non-considered vested in its discretion by PL 93-360. Id. at 13-16. The legislative history is cited to show that Congress intended the NLRB to exercise its expertise as to appropriate bargaining units. Id. at 13-14.^{26/} And the committee reports concerning the possible exclusionary supervisory status of house staff, which Judge Stewart saw as evidence of Congressional intent not to so exclude house staff from all regulation (426 F.Supp. at 451), for the St. Clare's majority becomes, plainly out of context, authority for so "evaluating the facts in each case" as to "conclude that not only are

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^{25/} By way of contrast, the Joint Commission for Accreditation of Hospitals, Accreditation Manual for Hospitals:1970 Updated 1973 (1973) at 42-43, requires peer review and ultimately review by a lay governing body in the event of failure of a hospital to appoint or reappoint an attending physician to the medical staff. More than 90% of reporting private non-profit hospitals with collective bargaining contracts covering professionals, provide for arbitration of disciplinary matters. 51 AHA Journal: Hospitals 67 (May 1, 1977) at 71-73.

^{26/} The legislative intention referenced relates to the avoidance of undue proliferation of bargaining units in the health care industry and has nothing to do with the issue of house staff exclusion. See S. Rep. 93-766, 93d Cong., 2d Sess. 5 (1974); Mercy Hospitals of Sacramento, Inc., 217 NLRB 765 (1975); Riverside Methodist Hospital, 223 NLRB No. 158 (1976).

housestaff not supervisors," but also to "preclude the regulation" of house staff "through collective bargaining." Id. at 14. Finally, the St. Clare's majority rehearses the legislative purpose to pre-empt the states as to health care facility coverage. Id. at 14-15.

Chairman Fanning responded to all this as follows:

"The particular role of housestaff in our health care delivery system is certainly worthy of greater attention than such a conception of what is involved in Cedars would seem to account for. A strike by research assistants at a university does not, in all candor, rise to the level of significance the health care amendments attributed to a strike by doctors. I do not, of course, wish to even intimate that the former is not a matter of concern in our national labor policy, but it is, unmistakeable, I think, that the process by which the amendments came to be did not contemplate the Agency entrusted with administration and enforcement of the amendments deciding the propriety of a recognition strike by doctors via application of Board policies related to educational institutions. In this regard, it may be noteworthy that housestaff, if indeed 'students,' are unlike any others and that the hospitals at which they work, if indeed 'educational institutions,' are unlike any others. The former proposition is self-evident, I submit. I am not aware of any of the 'students' in the cases to which my colleagues allude having, but for one example, legal authority to make incisions in other human beings. The denomination of the institutions involved as 'educational' is equally inappropriate. All of the educational facilities found in the cited cases, unlike all of the hospitals found in the housestaff cases, were incorporated under applicable state education laws. Of course, that they were merely reflects that the State, as well as the legislative history of the amendments, which at no point, as far as I can find, referred to any 'educational' institutions being added to Board jurisdiction, discerned the obvious differences between universities and hospitals." (Id. at 21-22) (emphasis in original).

"In the final analysis, it is the height of absurdity for Congress to enlarge this Board's

jurisdiction, to encompass the vast bulk of health care institutions in this country for the avowed purpose of minimizing the potential disruptions of health care delivery posed by organizational efforts of individuals not covered by Federal regulation until the amendments, and then, for this Board, upon some notion that the decisional basis for the question of coverage is found in 'precedent' involving student janitors, [San Francisco Art Institute], science graduate assistants [Adelphi University], and physics majors [Leland Stanford], to leave without regulation those in the forefront of organizing activity in the health care field, doctors. And, as Judge Stewart indicated in his opinion, the recent strikes at various New York City hospitals are the direct result of Cedars. They were also completely incompatible with the amendments and precisely the threat sought to be cured." (Id. at 30-31).

Argument

I.

THE DETERMINATION OF THE COURT BELOW ON THE
ISSUE OF PREEMPTION WAS CLEARLY CORRECT.

The NLRB determined in Cedars-Sinai that voluntary hospital house staff officers, although possessing certain employee characteristics, are primarily students and therefore not employees within the meaning of the NLRA. Now the NLRB seeks to expand the exclusion of voluntary hospital house staff from NLRA coverage to the exclusion of such house staff from all coverage, state and local as well as federal, under a doctrine of preemption by exclusion. We believe the NLRA proscribes rather than authorizes the creation of such a dangerous no-man's land in the area of hospital labor disputes.

A. The SLRA mandate for SLRB jurisdiction over house staff
at voluntary hospitals.

The SLRA covers employees of a non-profitmaking hospital who are defined as "any person[s] employed or permitted to work by or at a non-profitmaking hospital." SLRA §1(12), Labor Law §701(12) (emphasis added). This coverage, which is broader than that provided by NLRA §2(3), was enacted in 1963 and stemmed from long prior experience "with repeated strikes, picket lines and violence in non-profitmaking hospitals, which interrupted essential services by hospital employees" [Long Island Hospital v. Catherwood, 23 N.Y.2d 20, 31 (1968) (Fuld, C.J.)] and in recognition of the "profound public interest directly related to health and lives in the community" [Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 493, 510 (1970) (Breitel, J.)].

The unique and special SLRA address to labor disputes in voluntary hospitals manifests the "profound public interest" in such matters in the State of New York. Unlike other labor disputes in the private sector, those in the hospital area are expressly prohibited from ending in strikes or lock-outs. SLRA §13, Labor Law §713. And whereas other private labor disputes are left to the free play of economic forces for their resolution, grievances and bargaining impasses in hospitals are made the subject of settlement processes such as grievance procedures and arbitration. SLRA §16, Labor Law §716. These provisions are, of course, in addition to all those others in the SLRA available to hospital as well as all other employees. This State has, therefore, made more careful and complete provision for labor disputes in its hospitals than in any other field of labor relations in the private sector.

The State's concern in these matters was not intended to be easily subordinated. In several instances the SLRB found that the described SLRA coverage applied to non-profitmaking hospitals when such hospitals were excluded from the NLRA. Wycoff Heights Hospital, 27 SLRB No. 18 (1964); New York Infirmary, 27 SLRB No. 14 (1964); Long Island College Hospital, 27 SLRB No. 91 (1964); Society of the New York Hospital, 27 SLRB No. 141 (1964). Exclusion from the NLRA was not, in those cases, taken to mean pre-emption of the SLRA or ouster of the SLRB in voluntary hospital labor relations. During that same period, SLRA coverage was held applicable to house staff by the SLRB. Brooklyn Eye & Ear Hospital, 32 SLRB No. 21 (1966); Long Island College Hospital, 33 SLRB No. 32 (1967). The contemplated interaction of the described SLRA

coverage and the NLRA is specifically delineated in the SLRA [SLRA §15(1), Labor Law §715(1)]:

"The provisions of this article shall not apply to: (1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act...."

B. Preemption in the context of a significant state interest affecting the public health and safety.

Preemption is generally not to be based upon conflicts which "may possibly arise," as distinct from those which "will necessarily" arise. Goldstein v. California, 412 U.S. 546, 554 (1973); see also New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973); Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Ware, 414 U.S. 117 (1973); Kesler v. Department of Public Safety, 369 U.S. 153, 162, 164 (1962); cf. Askew v. American Waterways Operations Inc., 411 U.S. 325 (1973); see generally, Bratton, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 Columbia L. Rev. 623, 646-649 (1975). The cited cases fully vindicate the early view of Hamilton that preemption requires a showing not of "a mere possibility of inconvenience in the exercise of power, but an immediate constitutional repugnancy." The Federalist No. 32.

What is here ultimately involved is the power of the State of New York to protect the health and welfare of its people in an area where the NLRA, according to the NLRB, has chosen to be silent. It is "now [a] familiar maxim" that in cases "involving state statutes designed to protect public health and safety,...a federal statute will not be deemed to preempt state action unless there is a direct conflict or a clearly manifested congressional intent to

that effect." Murphy and LaPierre, "Nuclear 'Moratorium' Legislation in the States and the Supremacy Clause: A Case of Express Preemption," 76 Columbia L. Rev. 392, 439 (1976); see also Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132, 142 (1963); California v. Zook, 336 U.S. 725, 733 (1949); H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939). As the Court put the proposition in Dublino, supra, at 413: "The exercise of federal supremacy is not lightly to be presumed."

Exceptions to federal labor preemption have proliferated vastly in recent years in deference to substantial state interests. See discussion in Farmer v. United Brotherhood of Carpenters, etc., 45 U.S.L.W. 4263, 4265 (U.S.S.Ct., 1977). Accordingly, the states are not preempted by the NLRA from dealing with libel (Farmer, supra), violence and threats of violence (see Morris, The Developing Labor Law [1971] at 794-7), matters of "peripheral concern" to the federal law (id. at 797-800), duty of fair representation (id. at 800-1), and various statutory exceptions (id. at 801-7).^{27/}

- C. There is here involved a very limited aspect of the preemption doctrine, i.e., preemption by exclusion from federal coverage. Ouster of state and local exercise of a significant aspect of the police power by exclusion from, rather than inclusion within federal coverage requires a clear and express legislative authorization or intention to create such a no-man's land. No such authorization or intention has been claimed or can be shown here.

The typical instance of preemption is, of course, duplication by state or local law of federal coverage. In the field

^{27/} Morris, op. cit. supra, at 806, concludes that "[w]here the Board lacks jurisdiction because of statutory exclusions, preemption under the Act is not involved."

of labor law the prototypical preemption doctrine is set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959) ("Garmon"), as follows:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield....

"At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections.... When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with nation policy is to be averted."

But since the NLRB has held that house staff officers are "primarily students" and therefore not "employees" within the meaning of NLRA §2(3) [29 U.S.C. 152(3)], and that house staff associations are not "labor organizations" within the meaning of NLRA §9(c) [29 U.S.C. 159(c)], the NLRB and amici cannot plausibly argue that house staff, the CIR, or their labor activities or disputes are "arguably subject to...the Act" as stipulated by the Garmon test.

The court below correctly concluded that the Garmon line of authorities is inapplicable since here preemption by federal exclusion, not by "arguable" federal coverage, is claimed. Even apart from the obvious distinction between the effect of occupation and absence, the authorities

"...suggest that where Congress has not made clear its intention to preempt, or where a conflict is unripe or peripheral to the purpose of the federal statute, state legislation will be allowed to stand.... To preempt where Congress is silent and has not in terms covered the field creates a gap in needed regulation and leaves the state powerless to fill it. Permitting state regulation still allows Congress the option to

reverse the Court legislatively." (Bratton, op. cit. supra, at 653-654).

The NLRB brief to this Court fails to appreciate the difficulty in contending for preemption by exclusion. The argument by the NLRB here is (i) it was the intent of the PL 93-360 to preempt the field of labor relations at non-profit health care facilities, subject only to cession to the states pursuant to NLRA §10(a) [29 U.S.C. 160(a)] or §14(c) [29 U.S.C. 164(c)] (pp. 9-11), (ii) the NLRB determined house staff officers are not employees within the meaning of the NLRA and not entitled to collective bargaining (pp. 11-14), and (iii) since no jurisdiction was ceded to the states, they are bound by the NLRB determination (pp. 14-20). But the central premise of the argument is that exclusion from coverage is preemptive. The law is otherwise. Deference to the state police power is not to be lightly preempted or ousted by mere non-coverage. Only if exclusion from federal coverage implicates some Congressional purpose to leave house staff matters unregulated by the states as well as the federal government can preemption be found, and no such claim is or could be made here.

In WERC v. Atlantic Richfield Co., 77 LRRM 2750 (Wisc. Sup. Ct., 1971), the Wisconsin Employment Relations Commission ("WERC") was held to have jurisdiction over a unit, previously certified by the NLRB, when that unit became a one-man unit and the NLRB would not continue to designate it. The court there considered that the NLRB exclusion was the occasion for, not preemptive of WERC jurisdiction.

"...[H]aving found the NLRB to be by its own rulings without jurisdiction as to one-man units, the remaining question as to whether the activity involved is protected, prohibited or contrary to

the legislative purpose of the federal labor act is easily answered. The cases, it appears to us, make clear that it is not...."

* * *

"Unless the federal purpose can be found to be to create a No-Man's Land for one-man bargaining units, in which the only resort is to strikes and picketing, no case can be made for asserting that preemption governs as to such units. With the purpose of both the NLRA and the Wisconsin Employment Peace Act to seek the peaceful adjustment of labor-management disputes as a 'substitute for industrial strife,' we would hold that state agencies properly act in seeking to substitute collective bargaining for sidewalk settlement of disputes involving one-man bargaining units...."

* * *

"So we conclude, as did the WERC and the trial court, that the doctrine of federal preemption does not require the WERC to refrain from regulating collective bargaining in one-man bargaining units. The NLRB lacking jurisdiction to regulate such activity, and no national labor act purpose being frustrated by such state action, the attack upon the WERC order fails." (*Id.* at 2753-54).

In Baggett Transportation Co. v. Teamsters, 81 LRRM 2535 (Ala., Sup. Ct., 1972), independent contractors not deemed employees under the NLRA were held subject to state labor law jurisdiction:

"...since Congress has expressly excluded 'independent contractors' from the group to which it extends the protection of the National Labor Relations Act, matters predicated on disputes between them and those with whom they contract are specifically not subject to the act; and such disputes, therefore, cannot be 'arguably' subject to the same." (*Id.* at 2537).

In Farm Workers v. Superior Court, 4 Cal. 3d 556, 77 LRRM 2208 (Cal., Sup. Ct., 1971), state jurisdiction to enjoin consumer boycott picketing by a union of agricultural workers was sustained, although the employer was covered by the NLRA and entered into Teamsters' contracts under the NLRA, on the ground that

agricultural workers were excluded from the NLRA and the NLRA was therefore not preemptive. See also Foods, Inc. v. Leffler, 92 LRRM 3249 (Iowa, Sup. Ct., 1976). In M & H Fruit & Vegetable Corp. v. Doe, 80 Misc. 2d 1012 (Sup. Ct., Queens Co., 1975), the NLRA was held, because of its express exclusion of agricultural laborers from its statutory coverage, not to be preemptive of state jurisdiction over such laborers. The same result was reached by the SLRB with reference to the SLRA in Jackson & Perkins, 14 SLRB No. 70 (1951), where the NLRB had dismissed the charges of agricultural laborers of an employer plainly involved in interstate commerce, on the grounds that they were excluded from the coverage of the NLRA, and the SLRB held:

"Granting for purposes of discussion that the employer's business is one that substantially affects interstate commerce, we do not accept the contention that this Board is without jurisdiction for that reason. The National Labor Relations Act, as amended in 1947, provides in section 2, subdivision 3, that 'The term "employee" *** shall not include any individual employed in agriculture***.'

* * *

"The charge presently under consideration was previously filed with the Buffalo Regional Office of the National Labor Relations Board (Case No. 3-CA-312) and was dismissed on the ground that these employees are agricultural employees. This is an instance, therefore, in which Congress has chosen not to regulate the employer-employee relationship. At the same time, Congress has placed no restriction on state action as it did in section 14, subdivision a, of the National Act when it provided that no employer subject to the National Act may be compelled to deem supervisors to be employees 'for the purpose of any law either national or local relating to collective bargaining.' Under the circumstances, therefore, the states are free to act irrespective of whether the employer's business substantially affects interstate commerce (Bethlehem Steel v. N.Y.S.L.R.B., 330 U.S. 767)."

We note, too, that no case has suggested that the exclusion of public employees from NLRA coverage pursuant to NLRA §2(2) [29 U.S.C. 152(2)] preempts their coverage under the vast number of state and local public employment labor relations laws which provide coverage. See, e.g., Staten Island Rapid Transit Operating Authority v. IBEW, 393 N.Y.S.2d 772 (2d Dept. 1977). It is, therefore, clear error to argue, as does the NLRB here, that exclusion from NLRA coverage mandates,--for reasons of uniformity,--exclusion from state coverage by way of preemption.

Nor is the NLRB reliance upon uniformity as grounds for preemption on any better footing if it reflects concern that a single hospital may be subject both to state and federal labor relations regulations which may differ in some respects. We know of no case, and the NLRB and amici cite none which holds that such a set of circumstances ousts a state or jurisdiction in an area not otherwise preempted by federal law. To the contrary, numerous cases have held that an employer engaged in interstate commerce, and thus covered by the NLRA, is also subject to state labor laws with respect to employees excluded from the NLRA. That was exactly the case in Jackson & Perkins, supra. An employer of NLRA-excluded agricultural or household or family member workers [NLRA §2(3); 29 U.S.C. 152(3)], who may thereby be subject to an applicable state labor relations law [see, e.g., California Code Ann., Labor Code, Part 3.5, §61140-1166.3 (labor relations law covering only those "excluded from the National Labor Relations Act...as agricultural employees") (id., §1140.4[b])], can and frequently does also employ others covered by the NLRA and is thus subject to

both the NLRA and the state law.^{28/} Yet no such situation, necessarily frequent, has been held to involve proscribed conflict. Multiplicity of regulation is no bar to the exercise by a state of its legitimate interest in labor regulation.

Any concern for exposing hospital employers to differing labor relations patterns, federal or local, according to whether house staff or other personnel are involved, is far less subversive of intra-hospital uniformity than that occasioned by the differences between labor relations treatment of house staff and others if house staff officers alone are excluded from coverage under all labor relations legislation as well as the NLRA. In the NLRA-covered voluntary hospital, according to the NLRB, hospital house staff officers, unlike hospital aides, or dietitians, or elevator operators, or clerks, or nurses, or paid attending physicians, are not protected or guaranteed by law in their right to organize or bargain collectively. Neither uniformity nor stability in voluntary hospital labor relations is served by the NLRB insistence that house staff, with direct and primary patient care responsibilities, be excluded from the NLRA regulation of strikes and the SLRA prohibition of strikes and left outside the ambit of regulation so as to leave the resolution of house staff grievances and house staff-hospital conflicts to unregulated warfare and tests of strength. Intra-hospital labor relations uniformity requires rather than proscribes SLRA coverage of house staff.

41.

^{28/} Chairman Fanning pointed out that "our experience with agricultural employees and all their employees, both those engaged in the agriculturally related functions and those not (e.g., a winery's office clericals), sufficiently undermines [the] notion" "that Federal regulation of some hospital employees (the non house-
(Continued)

Of course, where exclusion from NLRA coverage, as in the case of supervisory or managerial personnel, is mandated to preserve and protect the integrity of the collective bargaining process of those covered by the NLRA, then exclusion may be preemptive, not by reason of exclusion but because of the need for effective coverage. This is the teaching of Bethlehem Steel which is heavily but incorrectly relied upon here by the NLRB and amici.

In Bethlehem Steel it was held inappropriate for the SLRB to designate a unit of foremen for employers covered under the NLRA at the very time that the NLRB had refused to establish such a unit because the NLRB had determined that establishment of such a unit would frustrate the purposes of the NLRA. Correctly understood, then, Bethlehem Steel involves not preemption by mere exclusion, but preemption by reason of conflict. This appears more clearly from the brief of the Solicitor General submitted as amicus by special leave of the Supreme Court, where the Solicitor urged that the indicated conflict between NLRB and SLRB resulted in a subversion of the integrity of the collective bargaining process of all employees, including those covered under the NLRA as well as those excluded (at pp. 18, 24-25, 29-31, 36-37). Mandated collective bargaining with supervisors who are surrogates of, and owe loyalty to management, according to the NLRB and the Solicitor in Bethlehem Steel, threatened the proper roles of union and management in all aspects of NLRA-covered collective bargaining. In this context the Bethlehem Steel holding becomes clear.

Bethlehem Steel can only be read to foreclose conflict in an area clearly preempted by the NLRA, and not to mean that mere exclusion of supervisory employees, such as foremen, by the NLRB preempts SLRB jurisdiction over such personnel. Hanna Mining Company v. District 2 MEBA, 382 U.S. 181 (1965), which followed but never mentioned Bethlehem Steel, cannot otherwise be reconciled with Bethlehem Steel. For in Hanna the post-Bethlehem Steel statutory exclusion of supervisors from the definition of employees was held not to preempt state jurisdiction over those supervisors where no conflict resulted from the state exercise of jurisdiction. The proper reading of Bethlehem Steel limits its preemptive effect to exclusions necessary and fundamental for collective bargaining by those covered by the NLRA, a condition not claimed by the NLRB here in the case of house staff collective bargaining.

- D. NLRA §14 proscribes preemption by exclusion in the circumstances which obtain here.

The NLRA is silent on the question of NLRB discretion to exclude from its coverage any class or category of employees not excluded by the NLRA. Examination of statute and case law concerning the analogous question of exclusion of a class or category of employers is instructive as to the power claimed by the NLRB to preempt by exclusion.

Prior to 1957, the NLRB took the position that labor unions, when acting as employers, were exempted from the provisions of the NLRA. The Supreme Court held, in Office Employees Union v. NLRB, 353 U.S. 313, 320 (1957):

"We believe that such an arbitrary blanket exclusion of union employers as a class is beyond the power of the Board. While it is true that

'the Board sometimes properly declines to [assert jurisdiction] stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case' (emphasis supplied), Labor Board v. Denver Bldg. Council, 341 U.S. 675, 684 (1951), here the Board renounces jurisdiction over an entire category of employers, i.e., labor unions, a most important segment of American industrial life."

* * *

"It is true that the dollar volume jurisdiction standards adopted by the Board to govern its jurisdiction, Hollow Tree Lumber Co., 91 N.L.R.B. 635 (1950), exclude small employers whose business does not sufficiently affect commerce. But its exercise of discretion in the local field does not give the Board the power to decline jurisdiction over all employers in other fields. To do would but grant to the Board the congressional power of repeal. See also Guss v. Utah Labor Relations Board 353 U.S. 1, 4 (1957), where the Court refused to pass 'upon the validity of any particular declination of jurisdiction by the Board on any set of jurisdictional standards.'

"We therefore conclude that the Board's declination of jurisdiction was contrary to the intent of Congress, was arbitrary and was beyond its power."

In Hotel Employees Local v. Leedom, 358 U.S. 99 (1958), the Court held dismissal of a representation petition filed by a union representing hotel employees, based on the NLRB's "long standing policy not to exercise jurisdiction over the hotel industry" as a class, was beyond the power of the Board under the rule established in Office Employees.

Congress responded to the apparent conflict between the Court and the NLRB by enacting NLRA §14(c)(1) [29 U.S.C. 164(c)(1)] with the 1959 Landrum-Griffin amendments:

"The Board, in its discretion, may, by rule or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dis-

pute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

Congress thus for the first time sanctioned in part the NLRB policy of non-assertion of jurisdiction as to an entire class or category of employers, but severely circumscribed that prerogative by limiting its application solely to disputes not cognizable under NLRB jurisdictional standards prior to August 1959. Moreover, NLRA §14(c) further limited NLRB discretion to exclude from coverage disputes involving a class or category of employers to cases where the effect on commerce of such disputes was not substantial. Thus, when Congress addressed the NLRB contention that the NLRA vested it with discretion to exclude from NLRA coverage classes or categories of employers, Congress narrowly constrained NLRB discretion both as to subject-matter and as to time.

Congress never granted or sanctioned NLRB discretion to exclude employees by class or category. To the contrary, Congress in the NLRA affirmatively granted important rights to all employees in industries affecting commerce, excluding therefrom only narrow explicitly defined groups of such employees. NLRA §2(3); 29 U.S.C. 152(3). Yet, the NLRB now claims discretionary power, with no explicit or apparent limitations, to exclude from the coverage of the NLRA classes or categories of employees deemed by the NLRB "not entitled to collective bargaining rights."

The NLRB usurpation of a power of exclusion clearly withheld from the NLRB by the NLRA is here amplified by the NLRB claim that that power extends to exclusion of a class of employees

from all state and local as well as federal coverage. NLRA §14 permits no such extension of power by the NLRB. Where the Congress wished to exclude a class of employees from NLRA coverage and to preempt their coverage by any other state or local law, the Congress did so in precise terms. Supervisors are expressly excluded from the NLRA by NLRA §2(3) [29 U.S.C. 152(3)], and then any employer subject to the NLRA is expressly exempted by NLRA §14(a) from being "compelled to deem individuals defined herein as supervisors as employees for the purposes of any law, national ^{29/} or local, relating to collective bargaining" [29 U.S.C. 164(a)]. No such comparable provision is to be found in the NLRA as to the preemptive effect of the exclusion of house staff or any other such class of employees, and no general discretion in this regard is granted the NLRB.

The history of the NLRA makes clear that the Congress never intended to vest the NLRB with the power it now claims to create a no-man's land by combining the non-existent power of the NLRB to exclude a class of employees from the NLRA with the preemptive power emanating from the Supremacy Clause. Congress has twice sought to eliminate the "no-man's land" where the NLRB failed or refused to assert jurisdiction and the states were thereby barred from asserting jurisdiction. Twice Congress amended the NLRA to effect parallel complementary jurisdiction in state labor boards and the NLRB.

46.

^{29/} NLRA §14(b) [29 U.S.C. 164(b)] likewise explicitly deals with state or local laws relating to closed shops.

In the 1947 Taft-Hartley amendments, Congress added a proviso to NLRA §10(a) [29 U.S.C. 160(a)] which empowered the NLRB to cede jurisdiction to state or territorial agencies, which would then act as surrogate for the NLRB in the prevention of unfair labor practices where the NLRB declined to act.

The cession provision of NLRA §10(a) has never been exercised by the NLRB, because, in its view, no state law met the statutory standard. It was not clear, however, until 1957, that states were precluded under existing law from asserting jurisdiction in the absence of NLRB cession under NLRA §10(a). In Guss v. Utah, 353 U.S. 1 (1957), a companion case to Garmon, the Supreme Court settled the uncertainty, holding that NLRA §10(a) was the exclusive means whereby states could act concerning matters which Congress had entrusted to the NLRB. The Court noted the resultant danger of creation of "a vast no-man's land, subject to regulation by no agency or court," and added that "Congress is free to change the situation at will." Id. at 11. The dissenters in Guss, Justices Burton and Clark, wrote that the Court was not justified in interpreting NLRA §10(a) as evidencing "an unexpressed and sweeping termination of the State's pre-existing power to deal with labor matters over which the Board, for budgetary or other administrative reasons, has declined, or obviously would decline, to exercise its full jurisdiction." Id. at 17-19.

With the 1959 amendments to the NLRA, Congress followed the lead of the dissenters in Guss, and sought to specifically eliminate the no-man's land with NLRA §14(c)(2) [29 U.S.C. 164(c)(2)]:

"Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or

Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

The legislative history of NLRA §14(c)(2) leaves little doubt that the no-man's land was the evil sought to be eradicated:

"Mr. ERVIN. Mr. President, we have a condition which is a stench in the nostrils of justice. It has been a stench in the nostrils of justice for years, and the Congress has met time after time and has done nothing to remedy it.

This condition was brought about by Congress. Congress passed the Taft-Hartley Act and took jurisdiction over labor controversies from the States. After Congress set up the National Labor Relations Board, the courts said that since Congress had given jurisdiction over labor controversies, under the Taft-Hartley Act, to the National Labor Relations Board, the State courts could not exercise jurisdiction.

As a result, we have observed people who had legal rights for which they could obtain no remedy. We have observed people suffer labor wrongs for which they could obtain no redress. I say it is a disgrace to any system of law for a person to have rights which cannot be remedied and wrongs which cannot be redressed." (105 Congressional Record 6544-45).

"Mr. KENNEDY. What we intend to do is to fill the vacuum, not to continue it...."

* * *

"We attempted to secure adoption of the Prouty amendment, for which I voted. It provided that in the so-called no-man's land, the State courts and State agencies would administer the Federal law. But that amendment was not accepted.

Therefore, it seems to me that we did the next best thing; we provided that the States could assume jurisdiction in that area; but we made sure that the Board would not reverse itself and reject cases over which it now assumes jurisdiction." (Id. at 6548, 17902).

"Mr. McCLELLAN. That is what is wrong now. The Board can now take jurisdiction or not take jurisdiction, according to its discretion; and, in effect, we have a no-man's land, in which there are grievous wrongs and no remedy under American jurisprudence as of this time."

"...Now the Federal Government has taken jurisdiction and will not use it. I say the Federal Government should make its choice. It should either use the jurisdiction it has or should turn it back to the States. The question is that simple." (Id. at 6413, 6551).

* * *

"Mr. President, judging from the colloquy I have heard today on the no-man's land, we must keep this in mind: Up until 2 years ago, when the Guss decision was handed down by the Supreme Court we had no such thing as a no-man's land. The State courts were taking care of those cases, and there was no problem in the field. So we are not trying something new. Mr. President; we are merely going back to that which was in effect all the years we have had labor law up until 1957, when the Guss decision of the Supreme Court preempted the State area." (Id. at 17904).

"Mr. DIRKSEN....[T]he so-called no-man's land difficulty we have encountered under the National Labor Relations Board...was a good deal like the fellow up in Tewksbury, Mass., who at a ripe old age passed away. He went to Heaven and St. Peter said, 'You can't stay here.' Then he went down below, and the Devil said, 'Sorry, you can't stay here.' Then with some frustration, the old gentleman said, 'What will I do?' and the Devil said, 'You will have to go back to Tewksbury.'" (Id. at 6413).

And see generally 105 Congressional Record 17898-17904, 6409-6413, 6515-6551.

The NLRB in its Annual Report for 1960, discussing the new NLRA §14(c), said:

"These parallel provisions [NLRA §§14(c)(1) and (2)] are intended to bridge the 'no-man's land' between Federal and State jurisdictions, which formerly existed because State authorities had been held without power to act in cases in which the Board had, but did not, exercise jurisdiction under its established standards." (25 NLRB Annual Report at 18).

NLRA §14 is replete with the legislative purpose and intent to avoid the void created by federal exclusion and preemption, except where specifically provided by the Congress as in

the case of supervisors in NLRA §14(a) [29 U.S.C. 164(a)]. This aspect of the NLRA, by itself, should be sufficient to defeat the instant appeal. In conjunction with the special purpose and intent of the Congress to avert a no-man's land in hospital labor disputes, the effect of NLRA §14 is decisive here.

- E. In the enactment of PL 93-360 it was the purpose and intention of the Congress to defer to existing state legislation, such as New York Labor Law Article 20, governing labor relations in voluntary hospitals, and not to leave uncovered or unregulated house staff labor disputes, including the risk of strikes, at voluntary hospitals.

There is nothing in the legislative history of PL 93-360 to suggest preemption in the absence of NLRA coverage. There is, however, considerable evidence that it was believed that existing state legislation affecting voluntary hospital labor relations in New York and Minnesota should and would be continued in effect by the NLRB, pursuant to its cession powers under NLRA §10(a) [29 U.S.C. 160(a)], after the enactment of PL 93-360, and that, accordingly, the NLRA in application would not preempt such state legislation even though NLRA coverage duplicated that of those states.^{30/} The House Committee on Education and Labor, in commenting on an earlier version of PL 93-360, referred to existing state legislation on voluntary hospital labor relations and stated that it "urges the Board [NLRB] to exercise its authority...to cede jurisdiction" to those states. H.Rep. No. 92-1252, 92nd Cong., 2d Sess. (1972) ("1972 House Report") at 6. That same

^{30/} See Congressional Record May 2, 1974, S6942 (Sen. Taft), May 7, 1974 S7311 (Sen. Taft), July 10, 1974 S12105 (Sen. Mondale and Williams), July 11, 1974 H6393 (Rep. Thompson and Quie).

1972 House Report pointed out that "the committee wishes as little disruption as possible to existing patterns of collective bargaining..." Id. at 5-6. There was, therefore, no legislative purpose or intention to supersede viable state legislation affecting labor relations at voluntary hospitals, even where NLRA coverage was contemplated.^{31/}

The one instance where the Congress was confronted with the prospect of a no-man's land resulting from federal exclusion and preemption by reason of PL 93-360, was with respect to house staff and there the Congress took steps to avoid that consequence. At the 1973 hearings before the Sub-committee on Labor of the Senate Committee on Labor and Public Welfare, 93rd Cong., 1st. Sess. (hereinafter "1973 Hearings"), representatives of house staff organizations, including the CIR, specifically warned that extension of the NLRA to house staff officers created the risk of their exclusion as supervisors within NLRA §14(a) and preemption of the applicable SLRA under NLRA §14(a) so as to "disenfranchise" house staff and destroy existing house staff association organization and bargaining in New York. 1973 Hearings at 292-295, 349-353, 354; see also statements at 296-345, 355-363. The American Nurses' Association made the same point. Id. at 126.

The Congress responded by incorporating the following language in the relevant Committees' reports:

51.

^{31/} The NLRB refused to cede jurisdiction to Minnesota in the area covered by PL 93-360. In re Minnesota, 219 NLRB No. 170 (1975). The NLRB refusal to cede jurisdiction does not, of course, in any way diminish the intention and expectation of the Congress that the NLRB would continue in effect state legislation duplicating PL 93-360, thus indicating no intention to vitiate such legislation.

"Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of 'supervisor'. The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board [NLRB] decisions. The Committee notes that the Board has carefully avoided applying the definition of supervisor to health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations." [S. Rep. No. 93-766, 93rd Cong., 2nd Sess. (1974) at 6; H. Rep. No. 93-105, 93rd Cong., 2d Sess. (1974) at 5. See also 1972 House Report at 5].

Since the house staff concern was that their medical supervision of others in the interests of patient care would exclude them from NLRA coverage as supervisors and result in total exclusion by reason of NLRA §14(a), the Committees' reports were clearly calculated to avoid the feared consequence of such total house staff exclusion.

Even more fundamental to an understanding of the conflict between the position of the NLRB here and the legislative intention in enacting PL 93-360, and the compatibility between the CIR effort at SLRA coverage and that legislative intention, is the overwhelming purpose of the Congress when it enacted PL 93-360 to proscribe organizational strikes, to minimize and regulate impasse strikes by collective bargaining, mediation, and fact-finding, and to provide patient care safeguards in the event of strikes by requiring strike notice. Throughout the hearings, debates, and committee reports, PL 93-360 (as well as its predecessor bills) was considered, evaluated, and finally adopted in the context of

its efficacy in dealing with patient-threatening voluntary hospital strikes.^{32/}

Against the background of this legislative history and purpose, it is inconceivable to attribute to Congress the intention to abide the condition which the NLRB seeks to effectuate here, i.e., that house staff officers' labor disputes, including strikes, be left wholly unchecked and unregulated. No one, including the NLRB, controverts the proposition that house staff officers are actively and substantially engaged in patient care, whether as employees or "primarily" as students. It is just such patient care at voluntary hospitals Congress intended to protect entirely from organizational strikes and to safeguard from impasse strikes. The foregoing intention is palpably disserved by the NLRB position here, and clearly more nearly realized by SLRA coverage which would outlaw all house staff strikes and substitute

53.

^{32/} See Hearing on H.R. 11357, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, August 16 and September 6, 1972 (hereinafter "1972 Hearings"), at 141-145 (S. David Pomrinse, M.D.), 245 (Donald W. Dunn), 284 (George W. Yeckel) 269 (United States Chamber of Commerce), 297 (Association of Hospital Personnel Administrators of Greater New York); 1973 Hearings at 17-18, 94, 566-7 (Sen. Taft), 19, 29, 64-65, 68-70 (SEIU), 78-86 (chart of hospital strikes), 117 (ANA), 132-138 (American Hospital Association), 261 and 271 (Norman Metzger), 428 and 431 (Undersecretary of Labor Shubert), 561 (AF of L-CIO); S. Rep. No. 93-766, supra, at 1, 3, 6-7; H. Rep. No. 93-1051, supra, at 5; Conf. Rep., Cong. Rec., 93d Cong., 2d Sess., July 3, 1974 H. 6192; Cong. Rec., 93d Cong. 2d Sess., May 2, 1974 S. 6932-4 (Sen. Cranston) S. 6935 (Sen. Javits) S. 6940 (Sen. Taft), May 30, 1974 H. 4587-8, 4593 (Rep. Thompson) H. 4588 (Rep. Ashbrook) H. 4589 (Rep. Ford) H. 4590 (Rep. Clay), July 10, 1974 S. 12103-4 (Sen. Williams) S. 12106 (Sen. Cranston) S. 12109 (Sen. Taft), August 7, 1974 H. 7249 (Rep. Thompson) H. 7250-4 (Rep. Ashbrook) H. 7255 (Rep. Badillo).

for them collective bargaining rights and arbitration where collective bargaining fails.

Notwithstanding the clarity of the legislative purpose to proscribe or prevent strikes at voluntary hospitals, the NLRB has left no doubt that it intends that no mechanism of government shall be available to deal with house staff strikes. The majority of the NLRB does not take issue with, and evidently adopts the observations of Member Fanning that the effect of the NLRB's house staff decisions "is that housestaff...organizational, recognition, and bargaining strikes are no longer subject to the restraints on such activities that Congress enacted specifically to regulate such activities in the health care industry," and, further, that the majority of the NLRB is "seeking to preclude intervention by any state court or board, whether by making available procedures for the peaceful settlement of such disputes, or by injunction. Such disputes will be resolved solely in accordance with the militancy and economic resources of the contending parties, free of any restraining or mediatory influences of Federal or state law." Kansas City General Hospital II at 7-8.^{33/}

We believe that Member Fanning and, by implication, the majority of the NLRB are correct that preemption by default precludes any state intervention, by injunction or otherwise. And the failure of the voluntary hospitals, who claimed just such

^{33/} Nor did the NLRB majority dispute the comment of Member Fanning that his "colleagues have deprived these [Albert Einstein] interns and residents of any effective redress in any forum." Albert Einstein College of Medicine, 226 NLRB No. 185 (1976) at 7.

preemption, to seek any state court injunction of the CIR house staff strike of October 5-15, 1976, even though the CIR and those hospitals were in litigation in the state courts at that very time (see pp. 9 - 11, supra), underscores the apparent understanding of interested parties that preemption by exclusion precludes injunctive intervention.

The debilitating effect of the NLRB preemption doctrine as to house staff is no less even if it should be claimed, as the NLRB appears to suggest in its reading of Hanna and Beasley v. Food Fair, 416 U.S. 653 (1974), in its brief here (p. 19), that preemption does not impair state court power to enjoin house staff strikes. Apart from the circumstance that in New York the authority to enjoin hospital strikes derives from the same statutory pattern which establishes the rights and mechanisms for collective bargaining, thereby giving rise to serious questions whether house staff strikes can be enjoined pursuant to legislation from which such house staff are otherwise excluded by reason of preemption,^{34/} the New York experience with voluntary hospital strikes demonstrates the need to permit collective bargaining,--not merely to authorize injunctions,--to deal effectively with such strikes. Long Island College Hospital v. Catherwood, 23 N.Y.2d 20, 31-32 (1968). This State, at least, has concluded that some system of mandated and

^{34/} Under New York law strikes arising out of labor disputes cannot generally be enjoined. Labor Law §807. An exception is made for hospital strikes. Labor Law §713. But the exception is part of the Labor Law Art. 20 providing for labor relations mechanisms generally and for such mechanisms in voluntary hospitals specifically.

regulated collective bargaining and resolution of grievances and disputes, not just denial of rights to those who are needful of a fair opportunity to negotiate matters essential to them, is the most, if not the only effective way to avoid strikes at hospitals.

The recent experience of the CIR is a case in point. As documented in the Gluckmann affidavit, that experience confirms how the NLRB position here conflicts with the legislative purpose and intent in the enactment of PL 93-360 to avoid recognitional strikes and to provide for adequate notice to voluntary hospitals, mediation, and fact-finding in the instance of an impasse strike. NLRA §§8(d), 8(g), 213; 29 U.S.C. 158(d) and (g), 183. On October 1, 1976, the CIR was confronted with a united front by the voluntary hospitals in their refusal to recognize or negotiate with the CIR, and the destruction of a long-standing collective bargaining experience. The CIR was without any viable or timely remedy either before the NLRB, SLRB, or the state courts. Obligated to choose between virtual destruction in the area of representation of voluntary hospital house staff or a strike, the CIR and the local house staff associations at twelve hospitals struck for periods up to ten days starting October 5, 1976.

If not for claimed exclusion of CIR-represented house staff from appropriate labor relations law coverage, the hospitals would have continued, as they did in the past, to recognize and to bargain with the CIR and no strike would have been necessary. Indeed, if, as claimed by the CIR, the house staff represented by the CIR was deemed covered by the SLRA, a recognitional strike would have been unlawful and enjoined under the SLRA. Labor Law §713.

The NLRB position here urged, then, necessarily relegates house staff organizations such as the CIR, threatened with destruction by non-recognition, to recognitional strikes instead of to the peaceful and orderly recognitional machinery provided by the SLRA. In view of the clear and unqualified legislative history, intent, and purpose, in the enactment of PL 93-360, to avoid patient-threatening strikes at voluntary hospitals, the CIR experience confirms that it is the CIR and not the NLRB stand he which best comports with the purpose and intent of the NLRA in the area of voluntary hospital labor disputes.

F. There is no "national labor policy" served by, or to justify the NLRB effort here to preempt state and local coverage of house staff labor matters excluded from NLRA coverage.

To the extent the NLRB or the amici seek to justify the NLRB position here on the grounds of a national labor policy to exclude house staff from labor relations law coverage, we are unable to find any glimmer of a suggestion in the language or history of PL 93-360 to sustain such a policy on the part of Congress. Not a single witness at the 1972 or 1973 Hearings expressed any opposition to, or any "labor policy" antithetical to house staff collective bargaining as distinct from any other class of hospital personnel. Nothing in the debates or reports suggested a labor policy to that effect. To the extent that house staff coverage was before the Congress, it was plainly viewed with approval and sympathy. See Cedars-Sinai at 19-20 n.20, 21; St. Clare's at 20-21 n.39.

It is, moreover, frivolous to believe that house staff exclusion from labor relations coverage was or could have been, or even now can be contemplated. It was pointed out that substantial numbers of hospital employees, including professionals, work at public institutions and are subject to state and local collective bargaining laws pertaining to public employees. 1973 Hearings at pp. 578-581. The percentage of hospital employees at public hospitals had been fixed at 40% (1972 Hearings at 69), and Sen. Javits was particularly apprised of the coverage of employees at New York City municipal and other public hospitals under New York legislation (id. at 142-44).

The Gluckmann affidavit indicates that almost 45% of

all interns are employed at public institutions (A 156), and that major house staff organizations at Los Angeles County Hospital California, Cook County Hospital, Illinois, and the University of Michigan [see Regents v. MERC, 389 Mich. 96 (1973)] are engaged in collective bargaining covered by and pursuant to state or local laws governing public employee labor relations. A 156. Such house staff coverage under Massachusetts law was recently sustained by the Massachusetts Labor Relations Commission. Cambridge Hospital, BNA, Gov't. Employees Relations Report, No. 658, May 24, 1976, E-1.

In New York the coverage of house staff at public hospitals is comprehensive. The New York State Taylor Law (Civil Service Law, Article XIV) was held applicable by the New York State PERB to house staff at public hospitals subject to the Taylor Law. In re County of Erie, 9 PERB 3051 (1976). The same conclusion was recently reached by Westchester County PERB. Matter of CIR, Case No. 004-75 (June 1, 1977). House staff at New York City municipal hospitals on the HHC payroll have been held to be covered under the Collective Bargaining Law (New York City Admin. Code, c.54) by the New York City Office of Collective Bargaining. In re Doctors Association, New York City OCB Decision No. 31-73 (1973). And the Gluckmann affidavit confirms that the CIR is presently engaged in collective bargaining with the HHC and New York City on behalf of New York City municipal hospital house staff officers. A 156. The Gluckmann affidavit further points out that substantial numbers of house staff officers at voluntary hospitals who rotate to municipal hospitals and the HHC payroll are among the house staff represented by the CIR and covered by its collective bargaining contract with the HHC. A 157.

It is, therefore, not possible to justify the position of the NLRB in terms of some alleged national labor policy to exclude all house staff officers from labor relations law coverage. House staff at public health care institutions are engaged in collective bargaining pursuant to state and local law coverage throughout the nation, and in New York particularly, and neither the NLRA nor the NLRB purports or intends to preempt such coverage.

The post-litem St. Clare's declaration of a "national labor policy" that there shall be no house staff collective bargaining anywhere, does not change, if it could for purposes of this appeal,^{35/} the fact that there is no basis for such a policy. Absent such a basis, the policy must, of course, fail. Office Employees Union v. NLRB, 353 U.S. 313 (1957); Hotel Employees Local v. Leedom, 358 U.S. 99 (1958); cf. NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1172-73 (2d Cir. 1968). And it is a proper judicial function to review and determine, not for the NLRB alone to mandate, the sufficiency of a policy which preempts and ousts the states of jurisdiction under the Supremacy Clause. Office Employees, supra, at 320.

The student/employee cases cited by the St. Clare's majority hopelessly fail to establish the claimed policy, and need not be reviewed after Chairman Fanning's devastating analysis of those cases in his dissent. See pp. 24-31, supra. The cases are, in any event, here totally inapplicable since not one involved preemption, the only issue here. The other grounds asserted by St. Clare's are no more effectual.

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^{35/} For present purposes we shall assume that the record on this appeal can be amplified by St. Clare's, issued after the

(continued)

The policy considerations recited by the St. Clare's majority do not reference a single specific aspect of the St. Clare's record or that of any other house staff case before the NLRB. Not a single instance of proven or demonstrated incompatibility between house staff training and collective bargaining at any hospital is cited. Nor does the St. Clare's majority refer to any other source or authority, either in the field of collective bargaining or post-graduate medical education, to buttress its extraordinary proscription of any and all house staff collective bargaining. The St. Clare's majority opinion is written as a statement of first, a priori principles of self-evident validity.

By way of contrast, the American Medical Association, "the ultimate governing authority for housestaff programs in this country" (St. Clare's at 30 n.59), issued the following policy resolution at its House of Delegates meeting of December, 1975:

"A dispute is now pending as to whether interns and residents are employees, within the meaning of the National Labor Relations Act, or students. If they are employees subject to the Act, they are entitled to the protection of the Act in engaging in collective bargaining with hospitals.

* * *

Generally, an individual having the status of an employee is subject to supervision, direction and control, and uses facilities furnished by his employer. Employees receive compensation for their services and their services are expected to have value to their employers. Employers are required to withhold federal and state income taxes and to pay social security taxes in connection with wages

61.

35/ con't. decision below and therefore no part of the record here, even though the timing of St. Clare's deprives CIR of the opportunity to meet by appropriate proof the new matter raised by St. Clare's. Cf. NLRB v. Mercy College, 536 F.2d 544 (2d Cir. 1976). And we also put aside the vulnerability of the composition of the St. Clare's purported majority. See pp. 24-5, supra.

or salaries paid to employees. Each of the foregoing applies to the relationship that exists between hospitals and interns and residents.

The conclusion seems inescapable that interns and residents are at the same time both students and employees. The two categories are not mutually exclusive. The fact that they are in a learning process of acquiring new skills does not detract from their legal right to organize and engage in collective bargaining under the National Labor Relations Act. Nevertheless, it must be recognized that unless collective bargaining and negotiations are conducted judiciously and contained within proper limits by the respective parties, the result will be interference with the quality of graduate medical education.

The exercise of mature judgment and experience is necessary to keep the medical educational process free from procedures developed and suitable only for industry and commerce. On the other hand, the pursuit of legitimate economic objectives and working conditions which do not unduly interfere with the process of graduate medical education, patient care, or the physician-patient relationship should be protected. The responsibility to assist and protect junior members of the profession against economic exploitation under the guise of medical education falls within the province of organized medicine.

Based upon the foregoing considerations...it is appropriate for constituent and component medical societies to aid, assist or represent interns and residents and attending physicians individually and collectively in resolving disputes with hospitals and others. Such activities should be geared to achieve legitimate objectives without sacrificing the quality of graduate medical education or patient care." ^{36/}

The AMA Residency Directory (see note 5 supra) at 333-366B sets out the "Essentials of Approved Residencies" ("the Essentials") which governs all training programs in this country. The Essentials

62.

^{36/} The AMA action was reported in the publication of the aniscus AHA, 50 AHA Journal: Hospitals 121 (1976); see also Medical Society of New York State, 30 News of New York, No. 24 (Dec. 15, 1975) at 2.

specifically deals with "[e]mployment relations of house officers," and requires that they

"be embodied in the terms of a written agreement which should specify at a minimum the following:

1. The term of the residency.
2. The salary.
3. The conditions under which living quarters meals, and laundry or their equivalent are to be provided.
4. Whether the hospital will provide professional liability (malpractice) insurance for the resident, or whether he will be expected to provide such insurance at his own cost if he desires this coverage.
5. Whether the hospital will provide hospitalization and health insurance for the resident and his family.
6. Vacation periods.
7. Hours of duty, or the method by which this is to be determined.
8. The content of the educational phase of the residency, including duration and sequence of the specified assignments to clinical, laboratory or ambulatory care facilities." (Essentials at 338). ^{37/}

The Essentials also specifically requires "that the employment agreements with interns and residents provide appropriate safeguards for the educational component of the [training] program" (ibid.), thus confirming the AMA ability to discern and distinguish the economic and educational components of a training program.

The Essentials contemplates that the employment agreements between house staff and hospital may be collective in nature. In the "Guidelines for Housestaff Contracts or Agreements," approved by the AMA House of Delegates in December 1974,^{38/} the Essentials' references to "relationships of housestaff and institutions" at 63.

^{37/} The amicus AAMC, Survey of House Staff Policy and Related Issues (1976) ("AAMC Survey"), at 6, indicates that most hospitals "reported that they maintained a written document which defined the obligations of the institution and the house staff."

^{38/} The full text of the "Guidelines" is set out in Gordon, "Hospital Housestaff Collective Bargaining," 1 Employee Relations L.J. 418 (1976), at 430-35.

"public, voluntary and proprietary hospitals" are explained as follows:

"...the definition of the respective responsibilities, rights, and obligations of the parties involved can assume various forms: individual contracts or agreements, group contracts or agreements, or as a part of the rules of government of the institution.

II. Proposed Terms and Conditions

A. Parties to the Contract of Agreement

1. Contracts or agreements may be formed between individuals or groups, and institutions. Such a group might be a house-staff organization.
2. The two parties to an agreement or contract may be a single institution or a group of institutions, and an individual member of the housestaff, an informal group of the housestaff, or a formally constituted group or association of the housestaff, as determined by the housestaff organization.

* * * *

3. The institution and the individual members of the housestaff must accept and recognize the right of the housestaff to determine the means by which the housestaff may organize its affairs, and both parties should abide by that determination; provided that the inherent right of a member of the housestaff to contract and negotiate freely with the institution, individually or collectively, for terms and conditions of employment and training should not be denied or infringed. No contract should require or prescribe that members of the housestaff shall or shall not be members of an association or union." 39/

Not surprisingly, the AMA testified before a House Committee on April 4, 1977, in support of legislation for house staff collective bargaining. St. Clare's at 30 n.59.

64.

39/ Id. at 431-32

The AMA perception of the compatibility of house staff collective bargaining and training is based on experience. The record before this Court is uncontradicted that the CIR has engaged in house staff collective bargaining for 20 years at the major public and voluntary teaching hospitals in the New York City area. A 20-22, 156-57; see CIR answer Exh. 1 and 2. The record also evidences that such collective bargaining takes place in Los Angeles, Chicago, and Michigan. A 156. House staff association leaders have, of course, attested to the circumstance that bargaining with house staff has resulted in better education as well as better patient care.^{40/} Even more significant is the testimony of hospital management on this score. Mr. William Abelow, Counsel to the League representing major New York City voluntary hospitals, testified in 1973 before the Senate Committee considering the bill which became PL 93-360, that "...we have contracts with house staff. We live harmoniously together" in "bargaining with house staff," including "interns and residents, and chief residents, up and down the line." 1973 Hearings at 283. More recently on April 25, 1977, the former President of the HHC, the largest complex of teaching hospitals in the country, told the Subcommittee at Hearings on H.R. 2222 that:

"...it is our position that house staff physicians are predominantly employees entitled to

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^{40/} See 1973 Hearings at 291-423; Hearings before Subcommittee on Labor Management Relations of the House Committee on Education and Labor (hereinafter "the Subcommittee"), 94th Cong., 1st Sess., on H.R. 8408, etc. (1976) at 486-496; Hearings before the Subcommittee on H.R. 15842, transcript for Nov. 29, 1976 at 7-15, 15-23, 23-31, 31-36, 36-74, transcript for Nov. 20, 1976 at 164-174; Hearings before the Subcommittee on H.R. 2222, transcript for April 4, 1977 at 1-73 through 1-120.

appropriate collective bargaining coverage under statute. Furthermore, our experience over the past two decades with this situation has shown it, on balance, to be positive and supportive of quality patient care and quality educational programs." (Transcript at 3-64).

This same witness also testified:

"...our experience is not unique. Michigan, California, Boston and Cincinnati share in this experience. These areas have also evolved an effective positive working relationship with house staff physicians within the framework of collective bargaining.... There is, in my opinion, nothing in our experience to support a notion that collective bargaining infringes upon the quality of house staff programs or upon the appropriate relationships or decisions based upon local peer or academic standards." (Ibid.)

Dr. Robert Tranquada, Associate Dean, UCLA School of Medicine, testifying in opposition to collective bargaining legislation for house staff, told the Subcommittee:

"I would say that I suppose nobody in management would prefer to have an organized voice of interest across the table. It makes management's work longer hours, sometimes even 110 hours a week. On the other hand, my own feeling is that on the whole, and we certainly had an opportunity to disagree about a lot of things, on the whole the areas that have been pursued by the Interns and Residents Association Labor Council in Los Angeles have generally been viewed by those of us who, I think, felt we had the interests of the hospital and the patients close in mind, as being constructive interests....

"I think the question was asked earlier by Mr. Askin as to whether any adverse effects upon educational or medical education had occurred. I think whatever aggravation comes from sitting on the other side of a bargaining table or deciding to disagree, I would have to say that I cannot identify at this point any specific negative effects on medical education from what has happened in Los Angeles County, specifically in the County of Los Angeles, with the exception of some lost time by interns and residents who were on strike, and perhaps some dilution of the effort of some individuals from their primary educational purpose due to the organizing and managing of a collective bargaining organization...." (Hearings before the Subcommittee on H.R. 15842, transcript of Nov. 29, 1976, at 129-30).

Even the most militant opponent of house staff collective bargaining, Dr. John A.D. Cooper, AAMC President, was obliged to admit lack of information concerning the effect of such bargaining in those areas in which it has been most prevalent:

"Mr. Thompson [N.J.]: Well, now, New York, Wisconsin and Michigan housestaffs have for many years been considered employees and eligible for bargaining collectively under the protection of State law. Has that situation undermined medical education in those States in your judgment?

Dr. Cooper. In the first place, I don't have particular information about those programs...."
(Hearings before the Subcommittee on H.R. 2222, transcript of April 4, 1977, at 1-15).

Even more pernicious than its lack of substance or basis, are the consequences of the preemptive national labor policy set forth in St. Clare's. Stated in its essential form, the central argument of the NLRB and the amici here is that there is a national labor policy which absolutely and everywhere prohibits the equalizing force of collective bargaining where the joint mission of the parties to a relationship requires inequality of power between those parties. As we have shown, experience and authority deny the NLRB the power to declare and enforce such an extraordinary policy. But what must also be said is that that policy implicates nothing less than the destruction of collective bargaining, particularly for professionals,^{41/} notwithstanding its labor relations board sponsorship. This, no doubt, explains why Chairman Fanning said in St. Clare's at 30 that "surely this decision will have

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^{41/} About 40% of all salaried, non-managerial professionals are unionized, compared with 25% of the entire labor force. BNA, Labor Relations Yearbook 1976 (1977) at 222.

ramifications far beyond the housestaff question."

Every enterprise which uses persons to provide services to others is engaged with such persons in the joint mission to provide those services with profit and/or excellence, -- particularly the latter where professional skills are involved. Inequality of power in pursuit of such profit and excellence is inherent in the prerogative always reserved to management. If the need for inequality of power, implicit in all managerial authority over the service provided, forecloses the equalization of power implicit in collective bargaining, as held in St. Clare's, then there is no proper area for collective bargaining by professionals of which we can think.

Of course, the accommodation between collective bargaining and managerial prerogative is exactly to confine the former to hours, wages, and terms and conditions of employment, as NLRA §8(d) [29 U.S.C. 158(d)] specifies, so far as such matters obtain in the relationship, and to leave beyond the scope of mandated bargaining the excellence of service which is the proper subject of the ultimate power and authority of management. It may be assumed that managerial prerogative may be diminished to the extent that management is mandated to bargain on wages, hours, or terms or conditions of employment. But it is fundamental to the NLRA that where one's very living conditions, -- by way of income, hours of labor, and related working conditions, -- are involved, the opportunity is guaranteed to participate effectively, and therefore collectively, in the decisions governing those conditions. Separating out the matters belonging to bargaining and those belonging to management is the function of the appro-

priate labor relations agency.

Nothing in the relationship between house staff and the hospitals at which they serve changes the described dynamic. House staff officers in a training program are physicians who are grown men and women, frequently married and with families, who are dependent for their livelihoods upon their earnings as house staff officers,^{42/} whose time for rest, privacy, recreation and family are determined by the hours and schedules they spend at hospitals, and whose careers, safety, and even lives are^{43/} profoundly affected by the conditions under which they serve. Since, as the AMA December 1975 resolution recognized (see pp. 61-62, supra), house staff officers perform patient care services for which, as any employees, they are paid and the hospitals are compensated,^{44/} and are subject to the control, direction and supervision of those hospitals, their right to bargain collectively as employees on the described matters of their wages, hours, and terms and conditions of work is not destroyed by the further circumstance that education, principally by way of patient care service, is involved. For the proper scope of house staff bargaining is not education, but, rather, the economic matters of hours,

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^{42/} See AAMC, Program Cost Estimating in a Teaching Hospital: A Pilot Study (1969) at 88; 1973 Hearings at 302-03.

^{43/} Gordon, op. cit. supra, at 419-21.

^{44/} "Eighty-seven percent of the funds to support house staff stipends and fringe benefits come from patient revenue...." AAMC Survey at 3-4.

wages, and working conditions, a distinction plainly capable of administration. See Regents v. MERC, 386 Mich. 96 (1973); New York City Office of Collective Bargaining, CIR and HHC, Decision No. B 4-75 (1975); see also, generally, BNA, GERR, No. 711 (June 6, 1977) at 12-14, for discussion of definition of managerial prerogatives and bargainable subjects in education.

Whatever else the hospital/house staff relationship entails, it surely requires an address to house staff salaries, insurance, vacations, working schedules, uniforms, laundry, meals, on-duty rooms, etc., found in ~~house~~ staff contracts. See CIR answer Exh. 1 and 2.^{45/} That these matters may affect the "joint mission" of education is not significant. The work of every employed professional also affects the excellence, which is the mission of the professional's employment, as well as the essential educational component of his/her work experience; in the case of the employed teacher, education is precisely the mission of his/her work as an educator. Generically every policy consideration said by the St. Clare's majority to proscribe house staff collective bargaining applies as well to hospital-employed physicians not in training programs, hospital-based nurses, faculty in higher education, including departmental chairmen, teachers in primary or secondary schools, attorneys, accountants, etc. In each, collective bargaining impinges upon managerial prerogatives or individualization pertaining to the joint mission of patient care, curriculum, student advancement, client service,

70.

^{45/} Hospital provision for each of the indicated items, and usually by written agreement, is fully documented by AAMC Survey, Part I and II.

etc., -- but in none is the inequality of managerial prerogative deemed to extend to inequality as to wages, hours, and working conditions. Cedars-Sinai as ultimately inflated by St. Clare's may, indeed, signify the NLRB sense of its limitations in separating out in hospital/house staff relations the economics which are bargainable from the education which is not bargainable under the NLRA. But it does not follow that the NLRB may ascribe comparable limitations to all other labor relations agencies under the doctrine of preemption.

II.

NONE OF THE ARGUMENTS OF AMICI JUSTIFIES REVERSAL OF THE JUDG- MENT BELOW.

Most of the arguments made by amici have already been dealt with earlier in this brief. We shall, under this heading, discuss only such matters raised by amici not previously covered.

A. The AAMC and AHA amici brief

Although the AAMC here argues that New York may not, because of preemption, provide a labor relations mechanism for house staff collective bargaining, such was not the position of the AAMC when the initial series of house staff cases was before the NLRB. At that time the AAMC submitted a brief amicus in opposition to house staff coverage under the NLRA. Cedars-Sinai at 1 n.1. In that brief the AAMC contended that the NLRB should decline jurisdiction pursuant to NLRA §14(c)(1) [29 U.S.C. 164(c)(1)] for the identical reasons now cited by the NLRB as national labor policy. AAMC amicus brief in Cedars-Sinai at 44-77. If the NLRB had accepted the construction thus urged by the AAMC, SLRB jurisdiction would have followed automatically pursuant to NLRA §14(c)(2) [29 U.S.C. 164(c)(2)].

The objections of the AAMC/AHA brief to house staff collective bargaining are two-fold: (i) it is alleged to interfere with medical education (pp. 10-15); and (ii) it creates difficult problems in defining and sorting out, for purposes of determining which matters are the proper subject of collective bargaining, between educational and economic matters inhering in the house staff/hospital relationship (pp. 15-17).

The brief answer to the first objection is that responsibility for medical education is not among the proper functions of the NLRB. If that responsibility rests anywhere within the federal system, it belongs with the states which deal primarily with medical education and care. To the extent that any national standard or functions are implicated, they are the proper responsibility of the AMA which has expressed its views on house staff collective bargaining vis-a-vis training programs.

The collective bargaining administration problems conjured up by the AAMC are likewise irrelevant to the issues here posed. This appeal deals with the propriety of SLRA jurisdiction over house staff labor relations and the SLRB is prepared to assume and assert that jurisdiction. Based upon its pre-1974 experience with house staff collective bargaining, the SLRB apparently feels competent and able to deal with the problems of administration as posed by the AAMC.

B. The New York hospitals amici brief

These amici emphasize differences between the SLRA and the NLRA for the purposes of establishing actual potential conflict within the meaning of the Garmon doctrine. In this view of the issue, according to these amici, it is irrelevant whether house staff are actually employees. It is sufficient that the NLRB has determined, as a matter of national labor policy, that house staff officers are not entitled to coverage under the NLRA and that determination alone, according to amici, forecloses state jurisdiction because of the NLRA/SLRA differences.

It is significant that the New York voluntary hospitals

virtually acknowledge the employee status of house staff. The NLRB, unlike these amici, apparently recognizes that once the employee status of house staff officers is acknowledged, NLRA coverage must follow. See St. Clare's at 30 n.57, 58. Absent some showing, as in Bethlehem Steel, that employees are to be denied coverage in order to preserve the integrity of coverage of other employees, -- a proposition not established by the NLRB or amici, -- the NLRA leaves the NLRB no option but to provide coverage for those who may be defined as employees, and it is this dilemma upon which the NLRB has foundered in its decisions and amici fail upon this appeal.

The circumstance that the SLRA and the NLRA differ in some respects was noted by the court below and properly rejected as a basis for preemption for the reason that even greater conflict with the purposes of PL 93-360 would be occasioned by the exclusion from SLRA coverage which would result from the doctrine of preemption. 426 F.Supp. at 453. We would add that the numerous instances in which an employer of NLRA-covered employees may be subject to state labor relations regulations in connection with that same employer's NLRA-excluded employees (see pps. 37-40, supra) undercuts the reliance of these amici on the differences between the SLRA and NLRA.

C. The AECOM amicus brief

We were unable to find in this amicus brief any substantive arguments not raised by the NLRB and/or other amici herein and, therefore, we do not undertake any separate discussion of this brief.

Conclusion

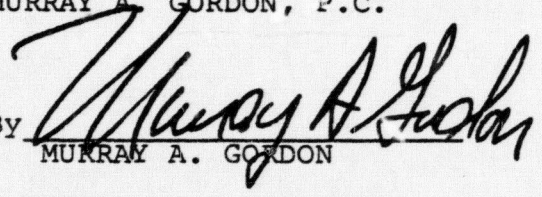
The judgment of the court below should be affirmed.

Dated: New York, New York
June 17, 1977.

Respectfully submitted,

MURRAY A. GORDON, P.C.

By


MURRAY A. GORDON

On the brief:

MURRAY A. GORDON
MARK KREITMAN

Attorneys for Defendant,
Committee of Interns and
Residents
666 Third Avenue
New York, New York 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
National Labor Relations Board,
Plaintiff-Appellant,

-against-

Committee of Interns and Residents and
the New York State Labor Relations
Board,

Defendants-Appellees.
-----X

AFFIDAVIT OF
PERSONAL SERVICE

Docket No.
77-6075

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

NARI PATEL, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age, and resides at 69-54 43rd Avenue, Woodside, New York 11377. On June 20, 1977 at 1185 Avenue of Americas, New York, New York 10036 deponent served the Brief of defendant-appellee, Committee of Interns and Residents, upon Poletti, Freidin, Prashker, Feldman & Gartner, attorneys for Beth Israel Medical Center, by delivering a true copy thereof to them personally.

Sworn to before me this

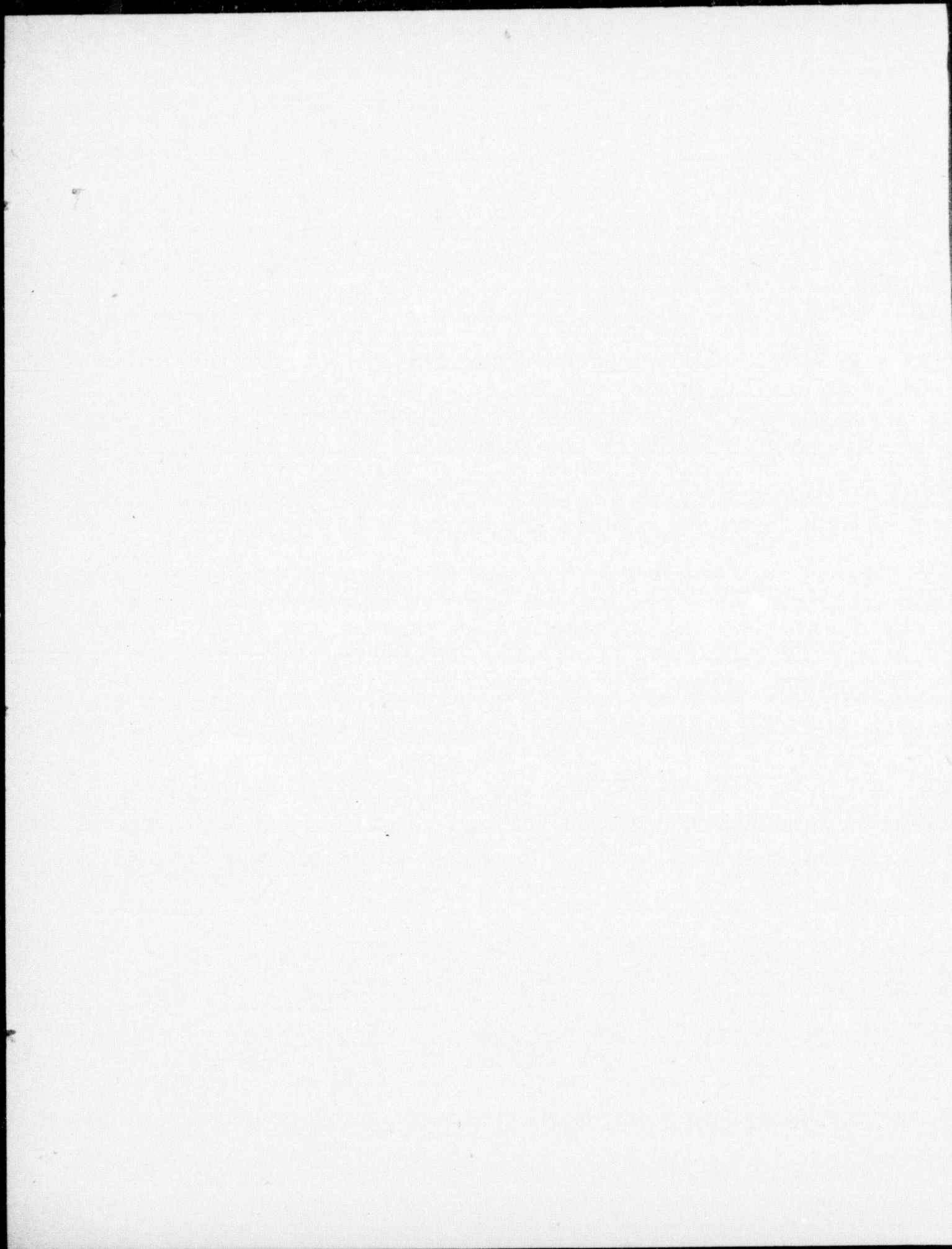
20th day of June, 1977.

Peggy Beckwith

Nari Patel

NARI PATEL

PEGGY BECKWITH
Notary Public, State of New York
No. 80-4824885
Qualified in Westchester County
Term Expires March 30, 1978



STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
☐ Attorney's Affirmation shows: deponent is

Check Applicable Box

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual Verification the being duly sworn, deposes and says: deponent is in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.
☐ Corporate Verification the of in the within action; deponent has read the foregoing a corporation, and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

Check Applicable Box

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at
☐ Affidavit of Service By Mail On 19 deponent served the within attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.
☐ Affidavit of Personal Service On 19 at upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Check Applicable Box

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Sir:—Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,
MURRAY A. GORDON, P.C.

Attorney for

Office and Post Office Address
**666 Third Avenue
NEW YORK, N. Y. 10017**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,
MURRAY A. GORDON, P.C.

Attorney for

Office and Post Office Address
**666 Third Avenue
NEW YORK, N. Y. 10017**

To

Attorney(s) for

~~XXXXXX~~ Docket No. Year 19
77-6075

**UNITED STATES COURT OF APPEALS
~~FOR THE SECOND CIRCUIT~~**

National Labor Relations Board,

Plaintiff-Appellant

-against-

Committee of Interns and Residents, et al.,

Defendants-Appellees,

**AFFIDAVIT OF PERSONAL
SERVICE**

MURRAY A. GORDON, P.C.

Attorney for

Committee of Interns and Residents
Office and Post Office Address, Telephone
**666 Third Avenue
NEW YORK, N. Y. 10017
(212) 661-7900**

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
National Labor Relations Board,
Plaintiff-Appellant,

-against-

Committee of Interns and Residents and
the New York State Labor Relations
Board,

Defendants-Appellees.
-----X

AFFIDAVIT OF
PERSONAL SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

DARA BECKWITH, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age,
and resides at 10 Intervale Place, Yonkers, New York 10705. On
June 20, 1977, at 425 Park Avenue, New York, New York 10022 deponent
served the Brief of defendant-appellee, Committee of Interns
and Residents upon Gerald Bodner, attorney for Albert Einstein
College of Medicine, by delivering a true copy thereof to
him personally.

Sworn to before me this
20th day of June, 1977

Dara Beckwith
DARA BECKWITH

Peggy Beckwith

PEGGY BECKWITH
Notary Public, State of New York
No. 60-4624885
Qualified in Westchester County
Term Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
☐ Attorney's Affirmation shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual Verification the foregoing being duly sworn, deposes and says: deponent is in the within action; deponent has read and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.
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The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

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duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,
MURRAY A. GORDON, P.C.

Attorney for

Office and Post Office Address
666 Third Avenue
NEW YORK, N. Y. 10017

To

Attorney(s) for

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MURRAY A. GORDON, P.C.

Attorney for

Office and Post Office Address
666 Third Avenue
NEW YORK, N. Y. 10017

To

Attorney(s) for

~~XXXXXX~~ Docket No. Year 19
77-6075

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

National Labor Relations Board,

Plaintiff-Appellant

-against-

Committee of Interns and Residents, et al.,

Defendants-Appellees,

AFFIDAVIT OF PERSONAL
SERVICE

MURRAY A. GORDON, P.C.

Attorney for Committee of Interns and Residents

Office and Post Office Address, Telephone

666 Third Avenue
NEW YORK, N. Y. 10017
(212) 661-7900

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Service of three copies of the petition
is admitted this 20TH day of JUNE 77 BRIEF

Norbert M. Phillips
NORBERT PHILLIPS, ESQ.
GENERAL COUNSEL
N.Y. S. LABOR RELATIONS BOARD

Service of three copies of the petition
is admitted this 20TH day of JUNE 77 BRIEF

EDWIN H. BENNETT, ESQ.
REGIONAL ATTORNEY REGION 2
NATL. LABOR RELATIONS BOARD

REGION 2
JUL 1 1977

Service of three copies of the petition
is admitted this 20TH day of JUNE 77 BRIEF

EDWIN H. BENNETT, ESQ.
ON BEHALF OF CARL TAYLOR

REGION 2
JUL 1 1977

